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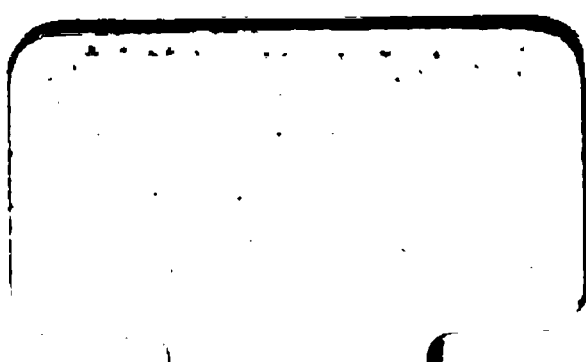
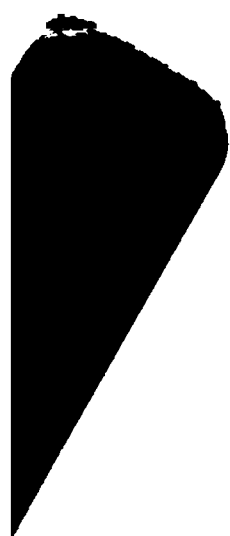
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THE
AMERICAN DECISIONS

CONTAINING THE
CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN
THE COURTS OF THE SEVERAL STATES

FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1860.

COMPILED AND ANNOTATED
BY A. C. FREEMAN,
COUNSELLOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENTS,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.

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A MERICAN DECISIONS.
VOL. LIII

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

DICKERMAN v. GRAVES.

[6 CUSHING, 303.]

HUSBAND AND WIFE, THOUGH DIVORCED, CANNOT TESTIFY AGAINST EACH OTHER as to any matters occurring during the marriage.

DIVORCED WIFE IS COMPETENT WITNESS IN ACTION FOR CRIMINAL CONVERSATION, brought by her husband, to prove criminal intercourse with her during the marriage.

ACTION for criminal conversation. The plaintiff's wife, having been divorced since the alleged criminal intercourse, was called as a witness on his behalf to prove the charge, and her testimony was admitted against the defendant's objection. Verdict for the plaintiff, and exceptions by the defendant.

J. H. Clifford and H. Platt, for the defendant.

N. Morton, for the plaintiff.

By Court, FLETCHER, J. The simple question in this case is whether the testimony of the wife was rightfully admitted.

There is no principle in the law, and no adjudged case, which would authorize the exclusion of this testimony; on the contrary, it has been expressly adjudged that a witness, situated precisely as this witness is, was competent, and such testimony admissible. It is a well-settled general rule that a husband and wife, while that relation exists, cannot testify for or against each other. The reasons of this rule are obvious and familiar. This rule is subject to some exceptions, as where a husband commits an offense against the person of his wife. The law does not seem, however, to be entirely settled,

how far, in a collateral case, a wife may be examined on matters in which her husband may be eventually interested. But in this case, the witness, when called, had been divorced; she was no longer the wife of the plaintiff; there was nothing, therefore, in her existing relation to the plaintiff which rendered her incompetent. But the objection to her competency rests on the fact that she had been the wife of the plaintiff; and it is maintained that though she had been divorced, yet that by the rule of law, she was incompetent to testify to anything that occurred, even her own criminal act, during the coverture. The proposition is, no doubt, fully established by the authorities, that even after the dissolution of the marriage contract, the husband and wife are not, in general, admissible to testify against each other as to any matters which occurred during the existence of that relation. The cases on this point are numerous and conclusive: *Monroe v. Twisleton*, Peak's Add. Cas. 219; *Doker v. Hasler*, Ry. & M. 198; *Barnes v. Camack*, 1 Barb. 392; *State v. Jolly*, 3 Dev. & B. 110 [32 Am. Dec. 656]; 1 Greenl. Ev., secs. 337, 338; *State v. Phelps*, 2 Tyler, 374. Mr. Phillips, in his treatise on evidence, 1 Phill. Ev. 83, Id., 8d Am. ed., 75, thus states the reason of the rule: "This, as Lord Ellenborough has said, is on the ground that the confidence which subsisted between them at the time shall not be violated in consequence of any future separation. Thus one great source of distrust is removed, by making the confidence, which once subsists, ever afterwards inviolable in courts of law."

The general rule that the husband and wife are not competent to testify against each other as to what occurred during the marriage relation, even after the marriage contract is dissolved, is no doubt a wise and salutary rule. The object of the law is, that the most entire confidence may exist between those sustaining the relation of husband and wife, and that there may be no apprehension that such confidence can ever, at any time or in any event, be violated, so far at least as regards any testimony or disclosure in a court of law.

But the case now under consideration comes neither within the rule nor the principle of the rule. The wife was not called here to testify against the husband, but on the contrary, she was called to testify, and did testify, in his favor, and on his behalf. She herself made no objection, but testified freely and voluntarily. There was and would be no violation of any confidence reposed in her by the husband, for he himself called her to testify, and she testified wholly at his request, and by

his procurement. There is nothing, therefore, in the rule of law on this subject which would warrant the exclusion of the testimony of this witness in the present case.

The case of *Ratcliff v. Wales*, 1 Hill (N. Y.), 63, is precisely like the present. It was an action for criminal conversation with the plaintiff's wife. The plaintiff, after showing a divorce *a vinculo matrimonii*, called his former wife to prove the adultery with the defendant for which the action was brought. It was adjudged that the testimony of the witness was properly admitted. Bronson, J., in giving the opinion of the court, says: "In the case at bar, the witness was not called against her former husband, nor was she asked to betray any trust or confidence which he had reposed in her during the coverture. The fact which she was offered to prove did not even come to her knowledge in consequence of the marriage relation. And although she was called by the husband, yet as the marriage had been dissolved, she had no interest to speak in his favor. I see no principle on which the testimony could have been rejected." There are other cases, which, though not so directly in point, yet favor somewhat this view of the case: *Hester v. Hester*, 4 Dev. 228; *McGuire v. Maloney*, 1 B. Mon. 224; *Stanton v. Willson*, 3 Day, 37 [3 Am. Dec. 255]. In bastardy cases, from the necessity of the thing, a married woman has been constantly admitted to prove her own criminal intercourse, by which the child was begotten: *King v. Reading*, Cas. temp. Hardw. 79; *King v. Bedell*, Id. 379; *Commonwealth v. Shepherd*, 6 Binn. 283 [6 Am. Dec. 449]. If it were proper to admit the wife in these cases to prove her criminal intercourse with the defendant, it would seem that she might properly be admitted to prove the same fact in the present case.

Exceptions overruled.

COMPETENCY OF HUSBAND OR WIFE AS WITNESS for or against each other: See *Wilmot v. Talbot*, 1 Am. Dec. 374; *State v. Davis*, 5 Id. 529; *Commonwealth v. Shepherd*, 6 Id. 449; *Bell v. Cotel*, 27 Id. 448; *State v. Boyd*, Id. 376; *Moffit v. State*, 36 Id. 301; *Babcock v. Booth*, 38 Id. 578; *State v. Patterson*, Id. 699, and notes. That a married woman is a competent witness to prove a criminal connection with her, under an indictment for fornication and bastardy, see *Commonwealth v. Shepherd*, 6 Id. 449. On the other hand, that a husband is not a competent witness against a person jointly indicted with his wife for adultery, see *State v. Jolly*, 32 Id. 656. So, where the wife is not jointly indicted: *State v. Welch*, 45 Id. 94. That a divorce, or the death of the other spouse, does not remove the incompetency of the wife or husband to testify as to matters occurring during the marriage, see *State v. Jolly*, 32 Id. 656; *Babcock v. Booth*, 38 Id. 578, and notes. In *Parsons v. People*, 21 Mich. 513, it is held, citing the principal case, that on an indict-

ment for adultery, the wife, with whom the offense was committed, is a competent witness against her paramour. In *Reeves v. Herr*, 50 Ill. 83, the case is referred to as admitting the general rule to be that a wife, even after a divorce, cannot testify against her husband respecting matters occurring during the marriage. So in *Dexter v. Booth*, 2 Allen, 561, the case is cited as recognizing the doctrine of exclusion as to such testimony as resting on the broad ground that all private communications between husband and wife should be regarded as sacred.

CLARK v. NEW ENGLAND MUTUAL FIRE INS. CO.

[6 CUSHING, 342.]

DEFECT OR INSUFFICIENCY OF NOTICE TO INSURANCE COMPANY OF LOSS IS WAIVED where the fact of the loss is communicated, but not in the manner required by the by-laws of the company, and no objection is made to the form of the notice, but there is an absolute refusal to pay on other grounds.

ALIENATION OF ONE OF TWO HOUSES INSURED IN SAME POLICY, but valued and insured separately, avoids the policy only as to the house so alienated, where the charter of the company provides that the "alienation of any property" shall avoid the "policy thereupon."

MISREPRESENTATION BY ASSURED THAT INSURED PROPERTY IS NOT INCUMBERED, in answer to a direct interrogatory on that point in the application, renders the policy void.

PRIOR POLICY IS NOT AVOIDED BY SUBSEQUENT VOID INSURANCE obtained from another company upon the same property without notice to the prior insurers, where the charter of the first company provides that "other insurance," without notice and consent on the company's part, shall avoid its policies; as where the second policy is vitiated by a material misrepresentation in the application.

LEVY OF EXECUTION ON INSURED PROPERTY IS NOT ALIENATION avoiding the insurance, under a provision in the charter against alienation, where a right of redemption still remains to the assured.

ASSUMPT on a policy of insurance on a certain tavern, and also on the plaintiff's shop. Each tenement was insured separately for a separate sum. The shop having been alienated by the plaintiff, nothing was claimed therefor. Prior to the loss, the tavern had been levied upon and set off on execution against the plaintiff, but the creditor had not taken actual possession, though he had received legal seisin, and the plaintiff's right to redeem was still subsisting when the action was brought. Other facts appear from the opinion. The case was submitted to the court upon the facts as to the plaintiff's right to recover.

J. H. Clifford, for the plaintiff.

T. G. Coffin and C. B. Farnsworth, for the defendants.

By Court, FLETCHER, J. The first objection made by the defendants to the plaintiff's right to recover is, that the plaintiff did not give notice of the loss in the manner and within the time required by the by-laws of the company. The defendants were in fact notified of the loss on the day after the fire, and in the manner stated in the report. Almost a week after this notice, the president of the defendants came to Fairhaven and New Bedford, and went to the ruins. The object of this visit of the president no doubt was to make himself fully acquainted with all the facts and circumstances of the case. After the president had thus been to the ruins, it would seem, as the case finds, that the defendants declined to pay the loss altogether. The president, without doubt, obtained all the information which he desired; and any further notice, therefore, to the defendants, would have been wholly unimportant and useless to them. The refusal to pay the loss was not put on the ground of any defect or insufficiency in the notice. No objection was taken at that time to the form of the notice; no further or more particular information was requested; but the defendants declined to pay the loss altogether; and that within the thirty days after the loss, and of course before the expiration of the time allowed to the plaintiff to give the notice.

This conduct on the part of the defendants, upon any sound and just principle of fair dealing, must be regarded as a waiver of any further or different notice. This position is directly and fully sustained by the cases of *Heath v. Franklin Ins. Co.*, 1 Cush. 257; *Vos v. Robinson*, 9 Johns. 192; *McMasters v. Westchester County Mut. Ins. Co.*, 25 Wend. 379; *Aetna Fire Ins. Co. v. Tyler*, 16 Id. 385, 401 [30 Am. Dec. 90]. The principle of waiver is a recognized and well-settled principle, and applies with much force to the present case.

The next ground taken by the defendants is that the shop which was insured in the same policy had been alienated by the plaintiff, and that this is such an alienation as will avoid the policy. But the shop was valued separately, and was insured separately, as a separate, distinct, independent subject of insurance, though insured in the same policy. The alienation of the shop would no doubt avoid the policy *pro tanto*, and only *pro tanto*. The tavern-house and the shop being insured separately, the alienation of one would no more affect the insurance on the other than if they had been insured in separate policies.

The section of the act of incorporation, upon which the defendants rely in support of this point, is the thirteenth, and

reads thus: "That when any property insured by the company shall in any way be alienated, the policy thereupon shall be void." The policy shall be void as to the property thus alienated, but not as to other property separately insured and not alienated. The case of *Smith v. Saratoga County M. F. Ins. Co.*, 1 Hill (N. Y.), 498, referred to by defendants' counsel, has no bearing upon the case under consideration.

The next ground of defense taken by the defendants is that the plaintiff, subsequent to the date of his policy, upon which this action is founded, obtained insurance upon the property by the Bowditch Mutual Fire Insurance Company, without such notice to the defendants as is required by the terms of the insurance.

By the twelfth section of the defendants' act of incorporation, it is thus enacted: "And if any other insurance shall be obtained on any property insured by this company, notice shall be given to the secretary, and the consent of the directors obtained; otherwise the policy issued by this company shall be void."

By the eleventh article of the defendants' by-laws, it is provided that "when, in conformity to the charter, a double insurance exists, the company is only liable to a ratable proportion of any loss which may be sustained."

After the making of the policy declared on in this suit, the plaintiff mortgaged the premises insured to secure the payment of about four hundred dollars, and this mortgage was outstanding at the time of the loss. While the estate was thus incumbered by the mortgage, and after the making of the policy in suit, the plaintiff applied to the Bowditch company for an insurance on the same premises, and in his printed application the following interrogatory is clearly and expressly put to the plaintiff, to wit: "State whether or not incumbered, and to what amount;" to which the written answer of the plaintiff is, "None." Upon the application of the plaintiff, containing this inquiry and this answer, the policy of the Bowditch company was issued, which the defendants now set up as a defense to this suit, alleging that the policy of the Bowditch company thus issued made void the defendants' policy previously issued, and upon which this suit is founded.

The defendants insist that the issuing of this policy to the plaintiff by the Bowditch company comes within the provision of the twelfth section of the defendants' act of incorporation, which is made a part of this policy, to wit: "And if any other insurance shall be obtained on any property insured by this

company, notice shall be given to the secretary, and the consent of the directors obtained; otherwise, the policy issued by this company shall be void;" and that the issuing of the policy by the Bowditch company, without notice given by the plaintiff to the defendants, rendered the defendants' policy void.

But the question is, Was "any other insurance obtained," within the just and true import of the section of the act before recited? The policy was issued by the Bowditch company upon an application by the plaintiff, in which it was distinctly and expressly stated that there was no incumbrance upon the premises insured, when in fact there was a mortgage thereon for about four hundred dollars. The existence of this mortgage was certainly a material and important fact, not only in regard to the lien of the insurers upon the property, but also as to the ability and responsibility of the insured, and as to his interest and estate in the premises, and in other respects. But when the insurers deem a fact material, and make an express and direct inquiry as to that fact, it is certainly material that the insured should answer such inquiry truly. It is perfectly clear, therefore, that the policy of the Bowditch company was issued upon a material misrepresentation of the insured in his application. It is manifest, therefore, that this policy is not binding upon the Bowditch company, and that the plaintiff could maintain no action upon it against that company. It is an invalid and useless policy. The contract between these parties was, that if the plaintiff obtained other insurance, without giving the defendants notice, the policy made by the defendants should be void.

The defendants now say that their policy is void, because the plaintiff obtained other insurance without giving them notice. But it does not appear, in point of fact, that the plaintiff did obtain other insurance. If the plaintiff had notified the defendants that he had obtained other insurance, this would manifestly not have been according to the fact. The plaintiff, to be sure, had obtained a policy, but it was not binding in law and could not be enforced.

This appears clearly and distinctly in the case. The transaction with the Bowditch company was not insurance in any just and proper import of the term, as used by these parties, and understood by them. It was not insurance, as manifestly understood by the defendants themselves, when they made their policy. By the eleventh article of the by-laws of the defendants, which are annexed to and make a part of the policy, it is provided that "when, in conformity to the charter, a

double insurance exists, the company is only liable to a ratable proportion of any loss which may be sustained." The provision of the charter referred to in this clause is, no doubt, the twelfth clause hereinbefore recited. The by-law, therefore, considers the other insurance, which may be obtained according to the twelfth section of the charter, as a double insurance; and when such insurance is obtained, then the defendants are to pay only their ratable proportion of any loss, leaving the insured to obtain the residue of the loss from the other insurers. But the insured could not obtain such residue of the other insurers, unless he had obtained other insurance which was valid and binding in law, and which could be legally enforced against the other insurers. It is evident, therefore, that the parties to the policy now in suit understood that the defendants themselves understood and intended, and such is the fair import of the terms, that the other insurance referred to in the twelfth section of the charter was a binding available insurance; one upon which the insured could rely for protection in case of loss, and which he could enforce by law.

The defendants were to pay only their ratable proportion of any loss; when the assured obtained other insurance according to the charter; thus clearly and manifestly assuming that such other insurance was to be a legal binding insurance, upon which the assured could receive the portion of his loss which was not paid by the defendants. As the defendants, in case of other insurance, were to pay only their ratable proportion of any loss, it was important that they should be made acquainted with the existence of such other insurance; and the insured was therefore required to give notice, and obtain the consent of the directors, and upon failure to do so, the defendants' policy was to be void. But the insurance, which was to destroy the defendants' insurance, was to be an available insurance, not a policy merely which was not binding in law, and was really and in fact no insurance.

A deed obtained by fraud is in legal intendment no deed at all, and a party may plead *non est factum*. It is immaterial, in regard to misrepresentation in obtaining insurance, whether it is made fraudulently or by mistake or accident; the effect is the same. A policy obtained by misrepresentation is in legal intendment no insurance at all; it has no legal effect. The policy of the defendants could not be avoided by obtaining another policy merely, but which was not an insurance in the proper sense of the term.

This same point has been before settled by this court in the case of *Jackson v. Massachusetts Mutual Fire Ins. Co.*, 28 Pick. 418, 423 [34 Am. Dec. 69]. In that case, the court say: "An insurance that shall operate to avoid the policy of the defendants, as a violation of the tenth article of their rules, must be a valid and legal policy, and effectual and binding upon the assurers. Assuming the second policy to have been made for the direct benefit of the plaintiff, it was wholly nugatory and of no effect; and cannot for this reason be now set up, to defeat the policy made by the defendants."

The same point has been decided in the same way by the supreme court of Pennsylvania, in the case of *Stacey v. Franklin Fire Ins. Co.*, 2 Watts & S. 506, 544, 545. The court say: "The defendants' defense rests on this, that the plaintiffs are doubly insured, but if the plaintiffs could at no time have recourse to the North American Insurance Company, it cannot with any propriety be said that they were doubly insured. If the plaintiffs have failed to perfect their contract with the subsequent underwriters, by omitting to have the prior insurance allowed of and specified on the policy as is required, it is difficult to imagine in what way the prior insurance can be invalidated or affected. It is a vain, nugatory, void act. An assurance to avoid the policy must be a valid and legal policy, and effectual and binding upon the assurers." "It must be remembered that to defeat the action against the first underwriter, the defendant must give the plaintiff a right of action against the subsequent insurer. He must, in effect, show a double insurance, which it cannot be, unless it gives the plaintiff a right of action for a proportion of his indemnity."

A different view of this subject was taken by the supreme court of the United States, in the case of *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495, decided in 1842. In the policy upon which that case was founded, there was the following clause: "And provided further, that in case the insured shall have already another insurance on the property hereby insured, not notified to this corporation, and mentioned in or indorsed upon this policy, then this insurance shall be void and of no effect." The defendants alleged that, at the time they made the policy in suit, there was an existing policy on the premises, made by the American Insurance Company, of which the defendants were not notified, as they should have been, and that for this reason the policy of the defendants was void. At the trial before the jury, the counsel for the

plaintiffs requested the judge to instruct the jury, "that if, in point of fact, the policy of the American Insurance Company was procured by a material misrepresentation, by the owners, of the cost and value of the premises insured, it was to be deemed utterly null and void, and, therefore, as a null and void policy, notice thereof need not have been given to the Washington Insurance Company at the time of underwriting the policy declared on." The judge refused to give the instruction prayed for, but on the contrary, instructed the jury that if the policy of the American Insurance Company was, at the time when that at the Washington insurance office was made, treated by all the parties thereto as a subsisting and valid policy, and had never in fact been avoided, but was still held by the assured as valid, then that notice thereof ought to have been given to the Washington Insurance Company, and if it was not, the policy declared on was void.

In giving the opinion of the court upon this instruction, 16 Pet. 509, Mr. Justice Story says: "We are of opinion that the instruction, as asked, was properly refused, and that given was correct. It is not true that because a policy is procured by misrepresentation of material facts, it is therefore to be treated in the sense of the law, as utterly void *ab initio*. It is merely voidable, and may be avoided by the underwriters upon due proof of the facts, but until so avoided, it must be treated for all practical purposes as a subsisting policy. In this very case, the policy has never to this very day been avoided or surrendered to the company." This decision, therefore, rests on the ground that the policy of the American Insurance Company, though taken to have been obtained by material misrepresentation, was not void, but merely voidable.

In *Carpenter v. American Ins. Co.*, 1 Story, 57, there is a report of a case decided in 1839, brought by the same plaintiff against the American Insurance Company, founded on the same policy made by them. The following are extracts from this report: "Story, J., delivered the opinion of the court, as follows: We are clearly of opinion that the policy in this case, having been obtained upon a misrepresentation of material facts, is utterly void. The misrepresentation made by an agent in procuring a policy is equally fatal, whether made with the knowledge or consent of the principal or not. The ground in each case is the same. The underwriters are deceived. They execute the policy on the faith of statements, material to the risk, which turn out to be untrue. The mistake is, there-

fore, fatal to the policy, as it goes to the very essence of the contract."

Upon the delivery of this opinion, the plaintiff discontinued his suit. In this case, therefore, the policy made by the American Insurance Company is pronounced to be utterly void, because the mistake goes to the very essence of the contract, while in the suit against the Washington Insurance Company, this same policy of the American Insurance Company was held not to be void, but merely voidable. Here would certainly seem to be a pretty direct conflict of opinion. In the opinion of the supreme court, it is said: "In this very case the policy [that is, the policy of the American Insurance Company] has never to this very day been avoided or surrendered to the company." But in a suit previously brought upon it, the defendants had set up the misrepresentation, in defense, and this same policy had been decided by Mr. Justice Story, before whom the case was tried, to be utterly void, whereupon the plaintiff had discontinued his suit. It is difficult to see how, upon these facts, it could be said that the policy had not been avoided, or of what importance it was, that it had not been surrendered to the company. It is certainly a very familiar principle of the law of insurance that a policy obtained by material misrepresentation is void. Proving the misrepresentation by the insurers is not regarded as an act necessary to avoid the policy, but as showing that the policy was void on that account.

The misrepresentation or mistake, as was said by Judge Story, goes to the essence of the contract. This principle was distinctly laid down by Lord Mansfield, and has been implicitly adopted and acted on ever since. He says: "Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void, because the risk run is vastly different from the risk understood and intended to be run at the time of the agreement:" *Carter v. Boehm*, 3 Burr. 1905, 1909.

It is not easy to perceive upon what principle the distinction between void and voidable, a distinction in regard to a policy of insurance, which, it is believed, is found nowhere else, could affect the right of the plaintiff in the case of *Carpenter v. Washington Insurance Company*, *supra*. The policy in that case, upon which the suit was brought, was to be void if the insured at the time had other insurance on the property. It appearing that at that time there was a policy on the property made by the American Insurance Company, if it did not distinctly

appear to the court that that policy was invalid and not binding on the company, then of course it must be treated as an insurance on the property, which would avoid the defendants' policy. But if it did appear distinctly and clearly to the court that this policy was not binding in law, that it had no legal validity and could not be enforced, it would seem that it could with no propriety, and in no proper sense, be called an insurance. In the opinion in *Carpenter v. Washington Insurance Company*, 16 Pet. 509, it was said: "And it may well be doubted whether a party to a policy can be allowed to set up his own misrepresentation to avoid the obligations deducible from his own contract." But the question was, What was his contract? As the defendants maintained that the policy made by them was void, because the plaintiff had other insurance, there would seem to be no sound reason why the plaintiff should not be permitted to meet this defense, by showing that in reality and in fact he had no such insurance. In the case now before the court, it did not appear that the misrepresentation as to the incumbrance was made fraudulently; it might have been by mistake or accident, which would equally avoid the policy.

Upon a careful consideration of the whole subject, we are fully satisfied of the correctness of the doctrine held by this court in the case of *Jackson v. Massachusetts Mutual Fire Ins. Co.*, 23 Pick. 418 [34 Am. Dec. 69], which is fully supported by the decision of the supreme court of Pennsylvania before referred to.

The only remaining ground of defense in this case is, that the levy of the execution was an alienation of the property. But as the plaintiff had still a right of redemption, and thus an interest in the property, this ground of defense cannot be maintained: *Strong v. Manufacturers' Ins. Co.*, 10 Pick. 40 [20 Am. Dec. 507].

Judgment for the plaintiff.

WAIVER OF OBJECTIONS TO DEFECTIVE NOTICE OR PRELIMINARY PROOF of loss by refusing to pay on some other ground, or by other conduct: See *St. Louis Ins. Co. v. Kyle*, 49 Am. Dec. 74, and cases cited in the note thereto. The principal case is cited with approval on this point in *Peoria etc. Ins. Co. v. Lewis*, 18 Ill. 560; *Pettengill v. Hinks*, 9 Gray, 170; *Blake v. Exchange etc. Ins. Co.*, 12 Id. 272; *Unthank v. Travelers' Ins. Co.*, 4 Biss. 361.

ALIENATION OF INSURED PROPERTY AVOIDS POLICY, WHEN: See *Bell v. Western etc. Ins. Co.*, 39 Am. Dec. 542, and cases cited in the note thereto. This subject is discussed at length in the note to *Lane v. Maine Mutual Fire Ins. Co.*, 28 Id. 154. As to the effect of an alienation of part of the property, see *Stetson v. Massachusetts Fire Ins. Co.*, 3 Id. 217; and the note to *Lane v.*

Maine Mutual Fire Ins. Co., 28 Id. 155. That under a policy providing against alienation, taken out by an equitable owner of property, a mortgage by the legal owner, without the equitable owner's knowledge or consent, avoided the insurance, was held in *Atherton v. Phoenix Ins. Co.*, 109 Mass. 35, citing the principal case.

LEVY OF EXECUTION NOT ALIENATION of insured property avoiding policy, when: See *Franklin Fire Ins. Co. v. Findlay*, 37 Am. Dec. 430. That such a levy, while a right of redemption remains, is not an alienation avoiding the insurance, is a point to which the principal case is cited in *Wilbur v. Bowditch etc. Ins. Co.*, 10 Cush. 450.

SUBSEQUENT INSURANCE TAKEN ON SAME PROPERTY AVOIDS PRIOR POLICY, WHEN: See the note to *Alliance Ass. Co. v. Louisiana Ins. Co.*, 28 Am. Dec. 125; see also *Jackson v. Massachusetts Mutual Fire Ins. Co.*, 34 Id. 69. That such subsequent insurance, in violation of a condition in the prior policy, avoids it, if the subsequent insurance is valid, is held, citing the principal case, in *Burt v. People's Mutual Fire Ins. Co.*, 2 Gray, 398; otherwise, if the subsequent insurance is void: *Kimball v. Howard Fire Ins. Co.*, 8 Id. 35; *Hardy v. Union etc. Ins. Co.*, 4 Allen, 221; *Thomas v. Builders' Fire Ins. Co.*, 119 Mass. 122; S. C., 20 Am. Rep. 317; *Allison v. Phoenix Ins. Co.*, 3 Dill. 484, also citing the principal case. To the same effect, see *Jackson v. Massachusetts Mutual Fire Ins. Co.*, 34 Am. Dec. 69, and the cases cited in the note to *Alliance Ass. Co. v. Louisiana Ins. Co.*, 28 Id. 125. As to whether a subsequent insurance on part of the property covered by a prior policy will avoid such prior policy *in toto*, *quære*: *Allison v. Phoenix Ins. Co.*, 3 Dill. 485, citing the principal case, and others pro and con.

SUBSTANTIAL MISSTATEMENT OF ASSURED'S INTEREST in the property insured, in answer to a direct interrogatory upon that point, vitiates the policy: *Jenkins v. Quincy etc. Ins. Co.*, 7 Gray, 374; *Towne v. Fitchburg etc. Ins. Co.*, 7 Allen, 53; *Campbell v. New England etc. Ins. Co.*, 98 Mass. 403, all citing the principal case. See, on this point, *Strong v. Manufacturers' Ins. Co.*, 20 Am. Dec. 507; *Curry v. Commonwealth Ins. Co.*, Id. 547; *Aetna Fire Ins. Co. v. Tyler*, 30 Id. 90; *Bell v. Western M. & F. Ins. Co.*, 39 Id. 542, and notes. See, as to the effect of misrepresentations generally upon a contract of insurance, *Burritt v. Saratoga Co. etc. Ins. Co.*, 40 Id. 345; *Houghton v. Manufacturers' etc. Ins. Co.*, 41 Id. 489; *Holmes v. Charlestown etc. Ins. Co.*, 43 Id. 428; *Frost v. Saratoga etc. Ins. Co.*, 49 Id. 234, and notes.

DAVIS v. BALL.

[6 CUSHING, 505.]

EVIDENCE OF ORAL BARGAIN PRIOR TO WRITTEN CONTRACT, or of contemporaneous or subsequent declarations, is inadmissible to affect the contract.

WORDS "MADE USEFUL" DO NOT CONSTITUTE LATENT AMBIGUITY in a written contract by a dentist who manufactured a set of teeth, warranting them for one year, and providing that "if on trial they cannot be made useful," they may be returned and the money refunded; and parol evidence is inadmissible to explain those words, but they are to be construed as meaning that the teeth are to be returned if the purchaser cannot make them useful on trial.

ACTION on a warranty in a contract executed by the defendants, who were dentists, charging the plaintiff for a set of teeth at a certain price, and warranting them for one year, with a provision that "if on trial they cannot be made useful, the teeth to be returned and the money refunded when called for." The defendants sought to prove, upon cross-examination of one of the plaintiff's witnesses, what price was orally agreed on for the teeth at the time and prior to the written contract, and that in the oral bargain there was no warranty, and that the warranty in the writing was without consideration, but the evidence was rejected. The defendants further claimed that the words "made useful" constituted a latent ambiguity, and offered to prove conversations at the time, and also a usage among the dentists of Boston to show that those words meant that the defendants were to make the teeth useful by subsequent adjustment. The court rejected the evidence, holding that there was no ambiguity, and that the words meant that the teeth were to be returned if on fair trial by the plaintiff's wife, according to her knowledge and the defendants' instructions, they did not fit her, and could not be made useful; and that on returning them within one year an action would lie for the money. Verdict for the plaintiff; exceptions by the defendants.

J. C. Park, for the defendants.

N. Richardson, for the plaintiff.

By Court, FLETCHER, J. The exclusion of the oral evidence offered, to show a bargain prior to the execution of the written contract, was justified by familiar and well-settled rules of evidence. This evidence was offered to affect the written contract. When parties have deliberately put their engagements into writing, all oral testimony of a previous conversation between them, or of conversations or declarations at the time when the agreement was completed, or afterwards, is excluded; as it would tend to substitute a new and different contract for that which was really and finally agreed upon and established between the parties. The writing is the best evidence of the contract ultimately concluded between the parties upon which they intended to rely, and by which they intended to be bound. Then it was said that the writing was a mere receipt, which might be contradicted. But so far from being a mere receipt, it was, in terms, a clear and express contract of warranty.

The evidence offered to explain a supposed ambiguity in the written contract was properly excluded for the reasons assigned by the judge at the trial. If there is any ambiguity, it must

be a patent ambiguity. But there is really no ambiguity, latent or patent. The construction put upon the contract by the judge at the trial was very clearly and manifestly correct. There is no ambiguity in the words "made useful," and no difficulty arises from the inquiry, "Made useful by whom?" The answer to the inquiry is very obvious—"Made useful by the person who was to try them, and for whom they were designed." The teeth were made, completed, finished. Though ever so skillfully made, it was uncertain, as it necessarily must be from the nature of the case, whether the person for whose use they were designed would be able to use them. It was therefore agreed that if the plaintiff's wife, upon trying them, should find she could not use them or make them useful, she might return them, and the money should be refunded.

There is nothing in the contract to warrant the construction that anything more was to be done to the teeth by the defendants. They had done what they could do while Mrs. Davis remained here, and as to the future, the contract clearly had reference only to what would be done upon trial by her to make them useful to her. The position that the evidence was admissible to explain technical terms cannot be sustained for two reasons; there were no technical terms, and the evidence was not offered for any such purpose or object.

Exceptions overruled.

ADMISSIBILITY OF CONTEMPORANEOUS OR PRIOR PAROL STIPULATION OF understanding to vary written contract: See *Rearick v. Swinehart*, 51 Am. Dec. 540, and note, citing other cases; see also *Pack v. Thomas*, Id. 135.

PAROL EVIDENCE TO EXPLAIN AMBIGUITY in written instrument: See *Storer v. Freeman*, 4 Am. Dec. 155; *Doolittle v. Blakesley*, Id. 218; *Brown v. Bebee*, 6 Id. 728; *Mann v. Mann*, 7 Id. 416; *Goddard v. Bulow*, 9 Id. 663; *Scanlan v. Wright*, 25 Id. 344; *Thompson v. Sloan*, 35 Id. 546; *Newcomer v. Kline*, 37 Id. 74; *Athins v. Bordman*, Id. 100; *Barnes v. Simms*, 39 Id. 435; *Brownfield v. Brownfield*, 51 Id. 590.

HUBBARD v. LLOYD.

[6 CUSHING, 522.]

BEQUEST TO "ALL THE CHILDREN" OF PERSON NAMED, EQUALLY, "when they shall severally attain" a certain age, inures to all children born before the first child attains that age, though after the testator's death, but not afterwards.

DEDUCTION OF TRUST FUND, SET APART FOR LEGATEE, FALLS UPON HER, and not upon the testator's estate, where a stated sum is bequeathed to be held in trust by the executors, the income, without diminution of the principal, to be paid to the legatee quarterly until her decease, the whole fund then to be the property of her children, where the sum specified is set apart by the executors and invested in good faith.

BILL by executors to obtain directions as to the distribution of the estate of James Lloyd, deceased. A certain sum was bequeathed to Augusta E. Greene, "to be held in trust" by the executors, and the income paid by them to her quarterly, until her death, the whole fund to be then divided among her children. The residue of the estate was bequeathed and devised to "all the children" of one Borland, and to two children of William Greene, named in the will, "equally or *per capita*, when they shall severally have attained the age of twenty-five years," the shares of any who died before that age to be divided among the survivors. The eldest child was born in 1817. The youngest, Alida, was born in 1833, after the testator's death.

F. O. Watts and E. Buck, for the plaintiffs.

W. H. Gardiner, for Alida Borland.

J. L. English, for the other children of Borland.

F. C. Loring, for the children of Greene.

By Court, SHAW, C. J. The persons interested in the residue of James Lloyd's estate are the two children of Greene named, and all the children of Borland born before the time when the first of the residuaries comes to the age of twenty-five; that is, before 1842, being twenty-five years from 1817, and this includes Alida; provided they arrive at the age of twenty-five; and if either dies before that age, the share of such deceased to be equally divided amongst the survivors of them, as well those who shall have received their shares, as those whose shares have not yet become payable. Those born after the first comes of age, when the legacy vests, are excluded: *Curtis v. Curtis*, 6 Madd. 14; *Gilbert v. Boorman*, 11 Ves. 238; *Andrews v. Partington*, 3 Bro. C. C. 401; *Leake v. Robinson*, 2 Meriv. 393; *Defflis v. Goldschmidt*, 1 Id. 417. If the executors have, in good faith, invested fifty thousand dollars as a separate fund, the income payable to Mrs. Greene, and the remainder to her children, it is a good execution of the trust in this respect. The estate is not to be kept open upon the possible contingency of a loss upon this fund. That fund being well created, the interest of it is to be paid to Mrs. Greene during her life, and the residue of the fund at her death divided among her surviving children, according to the directions of the will.

Decree accordingly.

AFTER-BORN CHILDREN MAY TAKE UNDER BEQUEST to the children of a particular person, where the period of distribution is so fixed as to admit of participation by all the children, whenever born: *Foodick v. Foodick*, 6 Allen, 44, citing the principal case; see *Thompson v. Garwood*, 31 Am. Dec. 502; *Collins v. Collins*, 45 Id. 420; *Lockerman v. McBlair*, 46 Id. 664, and the notes thereto.

WHERE FUND DIRECTED BY WILL TO BE INVESTED IS LOST to the beneficiaries, if the executor acted with strict fidelity and due diligence in making the investment, he is not liable for the loss: *Miller v. Congdon*, 14 Gray, 115, citing *Hubbard v. Lloyd*. In the same case, at page 118, the principal case is distinguished as not raising any question of the sufficiency of the appropriation of a trust fund under a will by the executor to throw a loss thereof on the beneficiary, and it is held that a mental setting apart of the fund by the executor is not sufficient. See generally, as to the liability of trustees for loss on investments, the note to *Nyce's Estate*, 40 Am. Dec. 506; *Knowlton v. Bradley*, 43 Id. 609; *Morris v. Wallace*, 45 Id. 642.

RAYMOND v. CITY OF LOWELL.

[6 CUSHING, 534.]

PARTY INJURED BY DEFECT IN HIGHWAY, WHILE NOT EXERCISING ORDINARY CARE, cannot recover against the town liable for the defect, unless the defect was the sole cause of the injury, and the burden of proving due care on his part is upon him.

ALLEGATION OF DUE CARE BY ONE INJURED BY DEFECTIVE HIGHWAY is sufficient after verdict where it is to the effect that the injury occurred while the plaintiff was walking along the highway "in the due prosecution of his business and in a proper manner."

CORPORATIONS HAVE SPECIES OF LOCALITY IN NATURE OF DOMICILE for the purpose of suing and being sued, under the Massachusetts revised statutes.

NON-RESIDENT, INJURED BY DEFECTIVE HIGHWAY, MAY SUE TOWN IN ANY COUNTY in the state, under the revised statutes of Massachusetts.

FOOT-PASSENGER HAS RIGHT TO CROSS STREET AT ANY POINT, and is not restricted to the regular crossings.

TOWN IS BOUND TO KEEP SPACE BETWEEN SIDEWALK AND CARRIAGE-WAY in its streets in a reasonably safe condition to permit foot-passengers to cross, and is liable for an injury from a defect therein to one using due care, but it is not bound to keep the entire space along the sidewalk in an equally safe condition.

TESTIMONY OF WITNESSES AS TO CONDITION OF STREETS IN OTHER TOWNS in the vicinity, with respect to the inequalities, elevations, and depressions in the space between the sidewalk and the carriage-way, is admissible, as bearing on the question of ordinary care, in an action against a town for an injury from a defect in that part of the street; but testimony that such space in other towns is not regarded as part of the highway requiring to be repaired is inadmissible.

LIABILITY OF TOWNS TO KEEP ROADS IN REPAIR IS STATUTORY, and the statute in Massachusetts applies equally to cities and towns.

TOWN IS BOUND ONLY TO ORDINARY CARE IN KEEPING STREETS in safe condition for travelers, and not to the highest possible care.

ELEVATION OF TWO INCHES ABOVE SIDEWALK OF GRATING over a drain at the edge of the sidewalk, upon which a foot-passenger trips in the daytime, and is injured while crossing the street at that point, there being nothing to prevent his seeing the obstruction, and no particular reason for his crossing there, is not such a defect as to render the town liable for the injury, considering the plaintiff's own want of ordinary care.

EXCESSIVE DAMAGES AWARDED FOR INJURY from a defective highway, plainly showing that the jury was carried away by sympathy for the person injured, are ground for setting aside the verdict; as where ten thousand dollars were allowed for an injury to the plaintiff's leg, whereby it was permanently weakened, but not entirely disabled so as to prevent his going about and performing some labor.

CASE to recover for an injury to the plaintiff's leg, by stumbling and falling over a grating at the edge of the sidewalk in a certain street in the city of Lowell, while attempting to cross the street not at a regular crossing. The plaintiff was described in the writ as a resident of New Hampshire, and the action was brought in Suffolk county, and not in Middlesex, in which Lowell is situated. The material facts and the various questions arising on the trial sufficiently appear from the opinion. Verdict for the plaintiff for nine thousand nine hundred and seventy-five dollars. Motion to set aside the verdict, and also in arrest of judgment. The latter motion, which was based on the ground that the declaration contained no allegation of due care on the part of the plaintiff, and that the action should have been brought in Middlesex, was argued first.

S. Bartlett and I. S. Morse, for the defendants.

R. Choate and F. Webster, for the plaintiff.

By Court, SHAW, C. J. The first ground of the motion in arrest of judgment in this case is that the declaration does not sufficiently allege ordinary care on the part of the plaintiff, at the time of the accident which occasioned the injury. It has been long held that the existence of the defect does not of itself alone give the right of action; but that if the party injured was not in the exercise of ordinary care at the time of the accident, he cannot recover, unless the injury was occasioned wholly by the defect, and not in any degree by the plaintiff's negligence. But here, we think, the plaintiff's exercise of ordinary care is sufficiently stated in the declaration. It alleges that the plaintiff was walking "in the due prosecution of his business, and in a proper manner;" this statement is perhaps imperfect, but it is sufficient after verdict. It falls within the general rule

that after verdict all those facts will be presumed to have been proved, without which the verdict could not have been truly found, if the declaration contains terms general enough to comprehend them by fair and reasonable intendment. In *May v. Princeton*, 11 Met. 442, cited at the bar, the declaration was quite as defective as the one now before us; it alleged the accident to have occurred "by reason of the defects and want of repair aforesaid;" and it was objected that, under that declaration, evidence that the plaintiff was in the exercise of ordinary care at the time of the accident, was inadmissible; but the court overruled the objection, and held that the evidence was rightly admitted. Without deciding whether the objection taken in this case might have been good on demurrer, we are of opinion that it is not open to the defendants after verdict.

The other ground taken by the defendants depends on the construction of the revised statutes, chapter 90, sections 14-16. The commissioners to revise the statutes, following the old law, recognized the distinction between local and transitory actions, and they provided, by section 14, that all transitory actions between parties living in the state should be brought in the county where one of the parties lived, and if brought in any other county should be abated; and they inserted section 15 merely to remove a doubt which might arise in case of two or more plaintiffs or defendants living in different counties. The sixteenth section was added by the legislature, in order to remove ambiguity as to the county in which actions, to which a corporation was a party, should be brought. In the case of *Taunton and South Boston Turnpike v. Whiting*, 9 Mass. 321 [6 Am. Dec. 124], which was an action of *assumpsit* brought in the county of Bristol by a turnpike corporation, to recover an assessment of one who had subscribed for shares in the plaintiffs' turnpike, the defendant pleaded in abatement, on the ground that the plaintiffs were a corporation in this commonwealth, and that neither they nor the defendant resided in the county of Bristol; but the court, upon consideration, "were satisfied that the plaintiffs, having no commorancy, were not within the purview of the statute relied on by the defendants," which was the statute of 1784, chapter 28, section 13, re-enacted in the revised statutes, chapter 90, section 14. From this case it would seem that before the revised statutes a corporation might sue or be sued in any county. The object of the legislature, in adding the sixteenth section to chapter 90 of the revised statutes, was not to make actions against corporations

local actions, but to give corporations a species of locality, in the nature of a domicile, and to determine where they should be held to be resident, for the purpose of suing and being sued. This section was not intended to limit the last clause of section 14, which in terms authorizes plaintiffs living out of the state to bring their actions in any county, but to carry out the general provisions of law, and apply them in certain cases to corporations. Taking all the statute provisions together, we think a transitory action by a plaintiff living out of the state, against a town, may be brought in any county, and that this action, therefore, was properly brought in Suffolk.

After the delivery of the foregoing opinion, the motion to set aside the verdict was argued by the same counsel.

The opinion was delivered at the March term, 1851.

By Court, FLETCHER, J. The plaintiff seeks in this suit to recover damages for an injury, alleged to have been received by him on the fifth of October, 1845, by reason of an alleged defect in a street in the city of Lowell. A verdict having been rendered for the plaintiff, the defendants have moved for a new trial, for various reasons, two of which relate to certain rulings at the trial.

The accident happened when the plaintiff was about to cross the street, from the sidewalk on one side to that on the other, and the defendants maintained that they were not bound to keep in repair that part of the highway forming the dividing line between the carriage-way and the sidewalk, so that the same could be safely used by foot-passengers for crossing; inasmuch as safe and convenient crossings were erected and maintained by the city at suitable distances, and as there was such a crossing within twelve feet of the place where the plaintiff attempted to cross.

But this general position was overruled by the judge who presided at the trial, and as the court now think, was properly overruled. There is no law or principle of law, or of reason, which confines foot-passengers to particular crossings. Such a restriction would be very inconvenient and annoying. The street should be kept in such condition that foot-passengers may be able to cross, with a reasonable degree of safety, using proper care themselves, at any and all places. The necessity of this might be illustrated very fully by reference to the common and ordinary course of business. A person who is left by an omnibus in the middle of the street should be able to go in

safety to the sidewalk, at the nearest point, and not be compelled to make his way among the carriages in the middle of the street till he can reach a place particularly set apart and designated for the purpose of crossing.

In the case of *Cotterill v. Starkey*, 8 Car. & P. 691, it was held that a foot-passenger has a right to cross the carriage road; and that a person driving a carriage along the road is liable to an action, if he do not take care so as to avoid driving against a foot-passenger who is crossing the road. In the case of *Boss v. Litton*, 5 Id. 407, it was held that a foot-passenger had a right to travel in the middle of the street. Lord Denman said: "A man has a right to walk in the road if he pleases. It is a way for foot-passengers as well as for carriages. But he had better not, especially at night, when carriages are passing along." These cases relate to the rights of foot-passengers, in reference to carriages, but they recognize the general right of foot-passengers to use the carriage-way.

The foot-passengers having such right to use the street, there must be a corresponding obligation on the part of the town to keep the streets in a safe condition for such use. But a town is not obliged to keep all the way, by the sidewalk, in an equally suitable and convenient condition for crossing. This would be wholly impracticable. The necessity of providing for draining off the water requires that streets and sidewalks should be constructed with a view to that object; so, if a foot-passenger, instead of availing himself of a crossing especially prepared, chooses to cross at another place, he must take care and see what is the actual state of the space between the sidewalk and the street. He has no right to assume that the way from the sidewalk to the street is smooth and even, but must exercise a caution and prudence adapted to the nature of the case.

Another exception taken by the defendants is, that the judge refused to admit the testimony of the superintendent of streets in the city of Boston, and that of the superintendent of streets in the city of Salem, to show that inequalities, or elevations and depressions, in the edge of the sidewalk or curb-stone dividing the carriage-way from the sidewalks in those cities, were of frequent occurrence, and not deemed in towns and cities to be a portion of the highway required to be reduced to a level, or worked or kept in repair, as a part of the highway for foot-passengers, or otherwise. The former was permitted to testify, and did testify, as to the matter set forth in the first part of the exception, which was in fact a matter very obvious

and known to everybody without any testimony. These particular facts, as to places other than Lowell, were admissible, as bearing upon the question of ordinary care. The testimony, as to the matter set forth in the latter part of the exception, was rightfully excluded, as referring merely to matter of opinion relative to the duties and liabilities of towns and cities.

The other grounds of the motion for a new trial are, that the verdict is against evidence, and that the damages are excessive. The plaintiff alleges in his declaration that the defendants, regardless of their duty, suffered a certain street called Central street, in said city, to be in an unsafe and dangerous condition; by means whereof the plaintiff was thrown down and greatly injured. This allegation it was incumbent on the plaintiff to prove, to maintain his suit, and on this motion for a new trial, it is insisted by the defendants that the verdict is against the evidence relating to this point.

The liability of towns to keep roads in repair is created by statute, the provisions of which apply equally to the country and to cities. The duty imposed is to keep the ways safe and convenient for travelers. In the performance of this duty, towns are not bound to exercise the highest possible care—the most anxious and watchful vigilance—but they are bound to exercise only ordinary care, considering the nature and particular circumstances of the case. A correct understanding of the question before us requires a careful examination of the evidence produced as to this point.

It appears by the evidence that the city authorities had been obliged to make an opening at a certain point on Central street, to admit water flowing down the street into a drain or culvert near the sidewalk. At this place the water from several streets collected, and after heavy rains large quantities were carried off by this drain. The opening into the drain was covered by a large iron grating, so that the water might pass through it, and also that persons might pass over it in traveling along the street. This grate was not fastened down by bolts, or otherwise, but was so fixed that it was supposed its weight would be sufficient to keep it in place. The longer side extended over the hole in the street, and the shorter came up against the sidewalk. The grate had remained in this situation for some time, and used occasionally to get loose. At times there was a great flow of water, and the opening was now and then choked up by floating articles, so that it was necessary to take up the grate, clear away the rubbish, and then put it back. In this way the grate was sometimes misplaced, the longest part

being turned towards the sidewalk, and the shortest part on the street, thus leaving a part of the hole in the street uncovered, into which horses passing in the street were in danger of falling; but it was not supposed that persons passing on the sidewalk, or off from the sidewalk, were in this way exposed to any danger.

This grate, although intended to be kept below the sidewalk, was sometimes found a little above the edge.. The weight of the evidence is, that at the time of this accident the grate was raised one inch and a half, or possibly two inches, above the edge of the sidewalk. The plaintiff says that he attempted to cross the street at this place, and tripped against the top of the grate, thus raised one or two inches above the edge of the sidewalk, and fell and received the injury of which he complains. There was evidence tending to show—perhaps the weight of evidence tended to show—that the plaintiff, in fact, fell north of the grate, and not by tripping against anything, but by stepping suddenly off from the sidewalk down into the street.

But assuming that he fell over the grate, as is alleged, then the evidence to maintain the allegation that the street was defective, unsafe, and dangerous, amounted to this, that the grate was from one to two inches above the edge of the sidewalk, so that a person attempting to cross in this place might, if he did not raise his foot two inches high, trip against the grate. It was in this way only that the street was shown to be dangerous. This was the extent of the danger; that is, there was an object against which a foot-passenger might trip, though it was certainly most unlikely and improbable that he would do so. If that makes a street unsafe and dangerous, and shows a culpable negligence on the part of the defendants, then every town is bound to remove every piece of earth, wood, and stone, or other substance, against which any one may, by possibility, strike his foot; and every city must level and smooth down every street and sidewalk, so that there shall remain no unevenness or bad joint, by reason of which any person may possibly be liable to stumble and fall. In short, upon this principle, every town and city is bound to do what manifestly never was and never can be done.

There is probably not a single street, in any city in the commonwealth, where there are not substances against which persons would be quite as likely to stumble as against this inch or two of grate upon the side of the sidewalk. There is an abundance of such stumbling-blocks all along the streets and sidewalks in Boston. Where there are brick sidewalks, it may

be seen by any one passing along that the bricks have frequently settled, so that the edge-stones, for a large part of the length of the streets, rise quite as much above the traveled part of the sidewalks as did the grate in this case, and are quite as dangerous. Besides, it may be seen all along our streets, directly in the midst of the traveled part of the sidewalk, that the stone gutters, and the stones round the wood and coal holes and other objects, rise above the level of the sidewalk full as high, and endanger persons passing quite as much, and probably much more, than was done by this grate. In truth, it would hardly have been supposed by any one that persons passing along the sidewalk, or passing off from it, were exposed to any danger by reason of the inch or two of grate above the edge of the sidewalk. If towns and cities are bound to remove all such things, then they are exposed to indictments for the existence of them. But it can hardly be believed that there ever was or ever will be an indictment in such a case and for such a thing. There would be no end to prosecutions if such a thing should be regarded as furnishing sufficient ground for an indictment.

The statute imposes upon towns the duty of keeping highways in a safe and convenient condition for travelers. This applies equally to towns and cities. But it does not import such absolute safety, as to preclude the possibility of accident or injury. This would be, from the nature of the case, wholly impracticable. Towns and cities are bound to exercise ordinary care and diligence, to keep the highways and streets reasonably and relatively safe and convenient. But they cannot be required to make all their highways equally safe and convenient. This would be impossible. Some roads are laid over very stony ground; some over hilly ground; some through woods; some are much, and some are little traveled; some are much, and others less exposed to drifts; and towns are required to use ordinary care and diligence to keep them safe and convenient, according to the circumstances of each particular case. But they are not bound to keep them absolutely safe, because there is absolute safety nowhere.

A man may stumble and fall anywhere and everywhere, in the house or in the street. But because he chances to fall in the street, it by no means necessarily follows that the town is responsible for any injury he may receive. The town cannot be held to insure every traveler against every possible accident and injury that may happen to him in passing along the highway or street. Towns and cities must exercise ordi-

nary care and diligence to make their highways and streets safe and convenient for travelers. This is the duty imposed on them by the law. For want of this they are liable, and this is the extent of their liability. Upon the whole, therefore, it seems to the court, taking a just, reasonable, and practical view of the liability of towns under the law, that the evidence in this case was by no means sufficient, but was greatly insufficient, to establish the charge that the street was unsafe and dangerous, as particularly specified, through the culpable negligence of the defendants.

But there was another essential point to be made out affirmatively by the plaintiff, in regard to which it is alleged that the verdict is against the evidence. The plaintiff was bound to show, to entitle himself to a verdict, that there was no want of ordinary care on his part. The plaintiff was himself required to exercise due and proper vigilance and care, to protect himself from injury. If the plaintiff's own negligence, or rashness, or want of ordinary care, concurred in producing the injury of which he complains, he ought not to have recovered damages for it against the defendants. The burden of proof was on the plaintiff to show affirmatively the exercise of such due and proper care and vigilance on his part. Now, the defendants allege that the verdict is against the evidence on this point.

It appeared by the evidence that the plaintiff was passing along Central street, and attempted to pass across the street, at the place where the accident happened, in the forenoon, in open, broad daylight. There was nothing whatever to obstruct his vision, to prevent his seeing every object just as it was situated, at this place. Of course, he saw, or was guilty of gross negligence if he did not see, that this spot was appropriated to the purpose and use of a drain to carry off the water. He saw, or was guilty of negligence if he did not see, that the grate extended along the sidewalk only, perhaps, two or three feet. He was within twelve feet of a safe and convenient crossing, particularly constructed for that purpose. There was nothing to hinder his crossing at any point on the street, and he might have crossed at any other point than the one at which he attempted to cross, with equal convenience to himself. But he chose to cross at that particular place, which had been appropriated to the purpose of a drain, and necessarily and properly so appropriated, and stumbled against the grate and fell. No reason was assigned why he selected this particular spot, in preference to any other point on the street.

If this was an unsafe and dangerous place, and the grate projected above the sidewalk, to the great damage and obstruction of all persons passing along or across the street, as is alleged in the declaration, the plaintiff surely could not have exercised ordinary care, in exposing himself to the perils of crossing at such a place without the slightest necessity. He could see with ease precisely what the perils were, and could with perfect ease have avoided them. He saw that there was a drain and an iron grate, which would be very likely to present obstacles, if not dangerous, in the way of the passenger. He was admonished, therefore, to be vigilant and watchful, and to take heed to his steps. But, so far as appears, he paid no attention whatever to the objects directly before him, and plainly in view, but stumbled over the grate. There was no difficulty whatever in avoiding the grate; it required no effort to avoid it; and that it was not avoided, can be accounted for only on the ground of a great want of attention and care. Under these circumstances, the finding of the jury, that there was due and proper care exercised on the part of the plaintiff, seems to be manifestly and decidedly against the evidence.

Another ground of the motion for a new trial is, that the damages given by the jury are excessive; being but a little short of ten thousand dollars. The plaintiff was no doubt seriously and permanently injured. His leg is not likely to ever be as strong as before the injury; and he is not likely to be able to perform as much labor as formerly in the business to which he has been accustomed. But still he is able to go about and to perform some labor. It is very difficult to see upon what just and reasonable ground so very large a sum could be awarded in damages. If the motion for a new trial stood upon this ground of excessive damages alone, the court would feel very strongly called upon to interfere.

But when the amount of damages is considered in connection with the finding of the jury upon the other points in the case, there is strong reason to believe that the jury must have been carried away by their greatly excited sympathy for the plaintiff in his misfortune and suffering, rather than have acted according to the dictates of their cool judgment and sound understanding. This court certainly would not disturb a verdict, as being against evidence, but in a strong and decided case. The present case is clearly and emphatically of that character, and imperatively calls for the interposition of the court. The plaintiff, no doubt, has met with a great mis-

fortune; and the suffering to which he has been subjected, and the continued weakness and infirmity of his limb, justly entitle him to the sincere sympathy of all persons, as individuals; but a sound and dispassionate administration of justice requires that this verdict should be set aside.

LIABILITY OF TOWNS AND CITIES FOR INJURIES FROM NON-REPAIR OF STREETS and highways, or from obstructions therein: See *Jacobs v. Bangor*, 33 Am. Dec. 652; *Lexington v. McQuillan*, 35 Id. 159; *Johnson v. Whitefield*, 36 Id. 721; *French v. Brunswick*, 38 Id. 250; *Dutton v. Weare*, 43 Id. 590; *Jones v. Waltham*, 50 Id. 783; *Parker v. Boston etc. R. R.*, Id. 709, and cases cited in the notes thereto. The principal case is cited in *Providence v. Clapp*, 17 How. 167, to the point that a municipal corporation is not liable at common law for an injury from a defective highway, but that the liability is wholly statutory; that the statutes of Massachusetts and other New England states on this subject apply to cities as well as to towns; and that the liability extends to defects in the sidewalk where it constitutes part of the street. In *Street v. Holyoke*, 105 Mass. 85, the case is also cited to the point that all parts of the highway, including the sidewalks and crossings, must be kept in such condition as to be reasonably safe for persons passing along or across the highway, having due regard to the character of the way and the amount of travel. That the duty and responsibility of a town with respect to defects in the highway are not limited to the traveled path, but extend to the whole width of the way, so as to make the town liable for obstructions and excavations at the side of the traveled path, see *Johnson v. Whitefield*, 36 Am. Dec. 721; *Jones v. Waltham*, 50 Id. 783, and note. In *George v. Haverhill*, 110 Mass. 511, the doctrine of the principal case, that a town is bound only to ordinary care in keeping highways in repair, is denied, and the true rule is said to be that such highways must be kept reasonably safe and convenient. In *Dowd v. Chicopee*, 116 Id. 95, the case is cited and explained in considering the question whether, in an action against a town for an injury from a defective highway, the court can decide that the evidence fails to show any defect in the way, and it is said that the facts were not in controversy in the principal case.

PARTY INJURED BY OBSTRUCTION IN HIGHWAY MUST SHOW DUE CARE on his own part in order to recover against a town therefor, but such due care may be inferred from circumstances: *French v. Brunswick*, 38 Am. Dec. 250; see also *Smith v. Smith*, 13 Id. 464; *Reed v. Northfield*, 23 Id. 662, and note. The question as to whether or not a person on foot uses due care in going upon the carriage-way, and as to whether or not a pile of snow in the street at a certain point, by which he is injured, is a defect of which he can complain, should be left to the jury: *Gerald v. Boston*, 106 Mass. 584, citing the principal case.

EVIDENCE OF CONDITION OF OTHER ROADS is inadmissible in an action against a town for an injury from a defect in a highway: *Dutton v. Weare*, 43 Am. Dec. 590. In *Packard v. New Bedford*, 9 Allen, 202, which was an action against a town for an injury caused by a gutter running obliquely across a street, testimony of witnesses showing that many other streets in the same and adjoining towns were crossed by gutters in the same way, was held admissible on the question as to whether or not the plaintiff had used ordinary care, citing the principal case. But in an action for an injury from leaving a drain uncovered in the street, evidence showing that it was usual for towns to leave

drains uncovered was held inadmissible unless the plaintiff had knowledge of the usage, distinguishing *Raymond v. Lowell*: *Hinckley v. Barnstable*, 109 Mass. 127. So in *Bliss v. Wilbraham*, 8 Allen, 565, an action for an injury from a defect in a bridge, testimony as to the safety of the bridge as compared with other bridges was held properly excluded, also distinguishing the principal case as one in which the testimony related, not to the general condition of the highway, but as to its mode of construction at a particular point. In *Champaign v. Patterson*, 50 Ill. 66, which was an action against a city for an injury from a defective sidewalk, testimony as to how other cities of the same size in the vicinity constructed their walks and crossings was held inadmissible. Speaking of the principal case, the court say: "It does not seem to us to be founded on correct principles, and we cannot follow it." In an action against a tender of a draw-bridge for negligence, opinions of tenders of other bridges as to the necessity of keeping the gates shut and hanging out lanterns at night were held inadmissible: *Nowell v. Wright*, 3 Allen, 170, citing the principal case.

DOMICILE OR LOCALITY OF CORPORATIONS for jurisdictional purposes: See *Wood v. Hartford Fire Ins. Co.*, 33 Am. Dec. 295, and note.

EXCESSIVE DAMAGES AS GROUND FOR NEW TRIAL: See *Jacobs v. Bangor*, 33 Am. Dec. 652; *Schlenker v. Risley*, 38 Id. 100; *McGray v. Lafayette*, 43 Id. 239; *Clark v. Whitaker*, 43 Id. 160; *Howard v. Grover*, Id. 478, and cases cited in the notes thereto.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

PEOPLE v. VAN CLEVE.

[1 MICHIGAN, 302.]

STATEMENTS BY COUNTY BOARD OF CANVASSERS, AND CERTIFICATE OF ELECTION GRANTED THEREON, are but *prima facie* evidence of the matters stated in such statements and certificate, and a contestant may go behind such returns, and, if necessary, examine the ballots themselves.

RETURN OF COUNTY BOARD OF ELECTION CANVASSERS NOT BEING CONCLUSIVE, an averment in a plea that it appears therefrom that the defendant had the largest number of votes is immaterial.

DUTIES OF ELECTION BOARDS BEING MERELY MINISTERIAL, their omissions or mistakes can have no controlling influence on the election.

IN SHOWING TITLE TO ELECTIVE OFFICE, IT IS SUFFICIENT TO AVER IN PLEA that the election was held, that there was authority to hold it, and that at said election the defendant received the required number of votes.

INFORMATION in the nature of a *quo warranto*, filed by the attorney-general against the defendant for exercising the office of probate judge. The plea of the defendant stated at length all the proceedings, from the notice of an election at which a probate judge was to be elected, down to the taking of the oath of office by the said defendant. The said plea did not aver that it appeared from the return of the election board that defendant had received the greatest number of votes, or that said board had so determined; further, the plea did not aver that sufficient statements were made out by the inspectors of the township elections, nor that such statements ever reached the county clerk's office. The attorney-general demurred, and defendant joined in the demurrer.

Lothrop, attorney-general, for the people.

J. M. Howard and Barstow, for the defendant.

By Court, MUNDY, J. The main objection to the plea is, that it is not averred that, by the statement made out by the county board of canvassers, it appeared that the defendant had the greatest number of votes, and that thereupon the board determined that he was elected. The objection involves an inquiry into the materiality of such averment, an inquiry to be solved by a just view of the effect which this tabular statement of the board has upon the title of the defendant to the office. There is no doubt that he must in his plea show a good title; but if we shall come to the conclusion that that title is in no wise affected by any act or omission of the board (the defendant having their certificate of his election, and having taken the oath of office and entered upon its duties), the materiality of such averment cannot be sustained.

The very ingenious argument of the attorney-general seemed to me to be based upon the supposition that the determination of the board was somewhat in the nature of a judgment at law, binding and conclusive, and that it afforded the only evidence of the rights of the contestants for this office; for, from the information, it does appear that Elias M. Skinner claims title thereto; and that such judgment must be based and appear to be based upon this statement as the finding of the board, as a judgment at law is rendered upon the verdict of the jury. But no such conclusive effect is given by the statute to this determination of the board, nor to the statement of the board, upon which it may properly be said to be founded.

The whole scope of the statute goes to show that this statement is but *prima facie* evidence; that in every contested election you may go behind it; that the county canvass may be corrected by the township canvasses, and that these may be corrected by the ballots themselves. A contested election is not to be decided by what does or does not appear in any of these statements.

This is evident from section 8 of chapter 6, revised statutes, page 45, which directs that "the inspectors shall preserve a true copy of all ballots rejected as defective, with the originals attached, and deliver the same to the township clerk to be filed in his office, and the other ballots they shall seal up and deliver to said clerk, who shall keep the same in his office until the next general election, subject only to the inspection of the proper authorities in case of a contested election." The

preceding section provides for the filing and preservation, in the respective township clerks' offices, of the statements of the township canvassers.

If, then, the statement of the county board is not conclusive upon the rights of the contestants, any averment in the plea that it appeared from such statement that the defendant had the largest number of votes, would be an immaterial averment. The election of the defendant and his title to the office depend upon his having received the largest number of votes given for the office, and this title is properly set out in the plea.

All that is said about the proceedings of the county board is immaterial; it may be struck out as surplusage, and will not vitiate even on a special demurrer: 1 Ch. Pl. 229. The precedents in *Wentworth*, and there is a large collection of them, go to show that all that is necessary for the defendant to state, in showing title, is the authority to hold the election, the holding of it, and that the defendant received the largest or the requisite number of votes. All this is properly averred in the plea in this case, with the further averments of the determination of the county board of canvassers in his favor, their certificate of his election, and his qualification by taking the oath of office.

The other objections to the plea that it does not aver that any sufficient statements were made out in the requisite form by the inspectors of the township elections; or that they ever reached the county clerk's office, as well as the one before noticed, are based upon the supposition that the defendant's title may depend upon the regularity of the proceedings of the boards of canvassers; and that to establish his title he must set out and show a strict fulfillment of their duty by these several boards.

The answer to this is, it seems to me, to be found in those provisions of the statute before referred to, which show that you may go behind all these proceedings—that you may go to the ballots, if not beyond them, in search of proof of the due election of either the person holding or the person claiming the office. And this is as it should be. In a republican government, where the exercise of official power is but a derivative from the people, through the medium of the ballot-box, it would be a monstrous doctrine that would subject the public will and the public voice, thus expressed, to be defeated by either the ignorance or the corruption of any board of canvassers.

The duties of these boards are simply ministerial; their

whole duty consists in ascertaining who are elected, and in authenticating and preserving the evidence of such election. It surely cannot be maintained that their omissions or mistakes are to have a controlling influence upon the election itself. It is true that their certificate is the authority upon which the person who received it enters upon the office, and it is to him *prima facie* evidence of his title thereto; but it is only *prima facie* evidence.

If an issue had been made, as it well might have been, by a replication denying that the defendant was, by the greatest number of votes given in the several townships of the county of Washtenaw, elected judge of probate, the very fact which the attorney-general supposes he would have been able to show, if the plea had contained an averment that it appeared from the statement of the county board of canvassers that the defendant had the largest number of votes, upon which he could have taken issue, might have been shown by him, if such statement would show it. So that the view which I have taken of this plea does not deny the people the advantage of any evidence properly within their reach.

The view which I have taken of the effect of the statement of the county board is fully sustained by the opinion of the supreme court of the state of New York, in the cases of *People v. Ferguson*, 8 Cow. 102, and *People v. Vail*, 20 Wend. 14.

In the case of *People v. Ferguson*, *supra*, it was held, notwithstanding the determination of the canvassers in favor of the defendant, that the court and jury could look even beyond the ballot-boxes, and inquire whether votes given for H. F. Yates were not intended by the voters for Henry F. Yates. In the case of *People v. Vail*, *supra*, Justice Bronson, delivering the opinion of the court, said: "The decision of the canvassers was conclusive in every form in which the question could arise, except that of a direct proceeding by *quo warranto*, to try the right. But to hold it conclusive in this proceeding would be nothing less than saying that the will of the electors, plainly expressed in the forms prescribed by law, may be utterly defeated by the negligence, mistake, or fraud of those who are appointed to register the results of an election."

The demurrer must be overruled, with leave for the attorney-general to reply.

Demurrer overruled.

CERTIFICATE OF ELECTION IS ONLY PRIMA FACIE EVIDENCE, and does not preclude collateral inquiry into the correctness or legality of the canvass: See *Rust v. Gott*, 18 Am. Dec. 497.

THE PRINCIPAL CASE IS CITED to the point that the duties of election boards are purely ministerial, and they are to receive the returns transmitted to them, if in due form and from the proper source, as correct, and to declare the result as appears from them, without attempting to inquire into and settle any question which may lie back of those returns, in *People v. Ottott*, 16 Mich. 321. The principal case is also cited in *People v. Higgins*, 3 Id. 233, and that part of its doctrine which says that the court may "go to the ballots, if not beyond them," is pronounced a mere *obiter dictum*. The doctrine of the principal case is followed to some extent in *People v. Tinsdale*, 1 Dong. 59.

CAMPAU v. GILLETT.

[1 MICHIGAN, 416.]

SALE OF PROPERTY BY ADMINISTRATOR IS VOID where the sale was made by virtue of an order obtained in due time, but not acted upon until the statute of limitations had run against the debts which made such sale necessary.

SALE BY ADMINISTRATOR UNDER ORDER OF COURT IS VOID, where the law empowering the court to make said order is repealed after the order has been granted, but before the sale has been made.

EJECTMENT. The defense relied upon was a deed to premises in controversy, from the executrix of the estate of plaintiff's ancestor. The remaining facts appear from the opinion.

Davidson, for the plaintiff.

Backus, for the defendant

By Court, WING, J. It is objected that the statute of limitations barred any claim which might have existed against the estate of the deceased, and therefore there could be no legal sale. The order of sale bears date the twelfth day of January, 1827. The day of sale was the seventh of July, 1831. Four years and six months, less five days, elapsed from the date of the order to the day of sale. Only thirty days' advertisement of sale was required, and probably a longer notice was not given; if so, more than four years had elapsed from the date of the order to the time of giving notice. By the law in force, from the time the order was granted to the time of sale, the time limited to bring an action against an executor or administrator was four years; after that period the suit was barred: Laws of 1820, p. 60, sec. 3. Our probate and limitation laws were adopted from those of Massachusetts, and with them, according to a familiar rule, we adopted the construction put upon those laws by the courts of that state.

In the case of *Wellman v. Lawrence*, 15 Mass. 326, an administrator presented to the court of probate a list of debts, including his own, on the tenth of January, 1804, and he was duly licensed by the court of common pleas, March term, 1804, to sell so much of the real estate of his intestate as should be sufficient to pay his just debts. A sale was advertised, but on the day of sale, the land, being offered, was not sold, and the auction was closed without adjournment. On the sixteenth of August, 1816, the administrator sold at public auction, after due notice, etc. The administrator never paid any of the debts due from the estate, and he had never been sued, and all the debts against the estate were on simple contract.

The court held the administrator had no authority to make the sale under the license at the time he sold. At the time of his obtaining the license, there were claims against the estate, but at the time he made the sale, no such demands existed. The court say: "As suits against them [administrators] are by statute to be commenced within four years, there can be no reason for the exercise of the authority given to the courts for licensing the sale of real estate for the payment of debts, after that term has expired." And again: "We should not then have licensed this administrator, at the time he made the sale, and there is no ground on which the sale can be justified, which would not have rendered it equally fitting to have granted a license at that time:" See also *Allen, ex parte*, 15 Mass. 58; *Thompson v. Brown*, 16 Id. 172; *Scott v. Hancock*, 13 Id. 164, 165; *Richmond, Petitioner*, 2 Pick. 569, note 2.

In the case of *Heath v. Wells*, 5 Pick. 140 [16 Am. Dec. 383], it was held: "A license granted to an administrator to sell real estate of the deceased, to pay a debt barred by the statute of limitations respecting executors and administrators, is void." In this case, the court remark upon the conclusive effect of a license—the court having jurisdiction—and say: "The court granting license to the administrator had no jurisdiction of the subject-matter; for if the administrator had no right to sell, the estate not being assets in his hands, the court had no cognizance of the case, and the license was merely void. It was not a case for deliberation or decision. The license could give no authority to the administrator, who might as well have been licensed to sell lands of a stranger. To make an administrator's sale valid, the right of the administrator to sell, and the license of the court, must coincide."

In *Nowell v. Nowell*, 8 Greenl. 220, the court held that "a

license to sell real estate, for the payment of debts, would not be granted where the claims appear to be barred by the statute of limitations." In this case, and in the cases in Massachusetts, referred to above, and the authorities therein referred to, the decisions appear to be put upon the ground that administrators have no power over the lands of the intestate, except there shall be a deficiency of personal property belonging to the deceased. At common law, the real estate descends to the heir of the deceased; and without the happening of that contingency, the right of the administrator to ask for a license, or of the court to grant it, did not exist. The statute of limitations was intended for the benefit of the heirs, that they might be quieted by a speedy settlement of estates in which they should be interested. From the authorities cited, and the reasons given, we think the sale by the administrator in the case before us was void.

It is also insisted that the order of the county court had spent its force before the day of actual sale, for the reason that the law under which it was granted had been repealed, and all power in such matters was vested in judges of probate. The law of 1820, from which the county court derived their power to grant the order, was unconditionally repealed by the law of 1829, acts of legislative council, 1829, page 86, the first section of which declares, "that the county courts of the respective counties in this territory lying east of Lake Michigan, shall not, hereafter, have jurisdiction of any civil matter in law or equity." Jurisdiction in probate matters, and the power to grant license to sell real estate to pay the debts of intestates, were by a law of the same year given to the judges of probate in the respective counties.

To this objection it is answered, that the powers of the county court were spent when they had granted the order, and it was remitted to the probate court to be acted upon; that the repealing law does not affect any act done; that the county court was not annihilated, its criminal jurisdiction remained; and that under the law of 1820, the action of the administrator upon the order was not to be reported to the county court, but to the court of probate; that the order was in effect a judgment, a final proceeding in the county court.

So far as the interests of purchasers are concerned, the courts of Ohio and this state have ever considered these orders of equal validity with judgments. If the court have jurisdiction of the matter, it has been held the purchaser need not look behind

the order: *Ludlow v. McBride*, 3 Ohio, 257; *Ludlow v. Johnson*, Id. 561, 562 [17 Am. Dec. 609]; *Goforth v. Longworth*, 4 Id. 130, 131 [19 Am. Dec. 588].

The law authorizes a sale, but, on a proper application, the court is to determine whether the facts submitted will, under the law, justify their making an order of sale. Without such order, the sale would be void. The order is the foundation of the power to sell. But without a law authorizing the sale, the order itself would be void. It would lay no foundation that would justify the execution of such power. Every order of court, to some extent, may be considered as a judgment; but it must have the character of a final judgment, or the consequences contended for by the defendant would not follow. By a final judgment, conflicting rights between parties are settled, and are made certain; and a party is entitled to receive that which he has recovered by a judgment, and this right cannot be taken away. By the order, the administrator gains no personal rights, neither does he nor the creditors lose any rights they gain by the order; the administrator is at liberty to sell, but whether he sells or not, does not concern him—he is only bound to the extent of the personal estate; and as to the creditor, he may enforce his claim by the agency of the administrator, or by a suit at law; no right is settled by the order—then how can the order have the effect of a judgment? Under certain circumstances, the administrator has by the law the right to sell; but the power to say when these circumstances have arisen is vested in the court, and it is only with the approbation of the court that this power—intrusted to him, not by the order of the court, but by the law under which he acts—can be exercised.

The order of sale, says the court in the case of *Ludlow's Heirs v. Wade*, 5 Ohio, 503, is nothing more than record evidence of the existence of the necessary facts to justify such a proceeding, and the assent on the part of the court that the administrator should exercise a power previously vested in him. It calls that power, which was before dormant, into life and activity. It follows, then, that a repeal of the law is a revocation of the power; and after its revocation, a sale made would be void, although during the existence of the statute an order for such sale had been made. In fact, the right to sell depends both upon the existence of the law and of the order, and when either ceases to be in force, the right is gone. A repeal of the law would have an affect to rescind the order, equivalent to the effect which the reversal of a judgment would

have upon that judgment; and, as after such reversal a sale would convey nothing, so after the repeal of the law would a sale made be void: while the law and the order are in force, a good title can be made; but not after one is repealed or the other rescinded.

In the case of *Bank of Hamilton v. Dudley's Lessees*, 2 Pet. 523, the question decided in 5 Ohio, above cited, was considered. The court say: "This is a point on which we cannot doubt. The power to sell is not an independent power, to be exercised at discretion, when the exigency, in the opinion of the administrator, may require it; but is conferred by the court in a state of things prescribed by the law. The order of the court is a prerequisite, indispensable to the very existence of the power; and if the law which authorized the court to make the order be repealed, the power to sell can never come into existence. The repeal of such a law divests no vested estate, but is the exercise of a legislative power which every legislature possesses. The mode of subjecting the property of a debtor to the demands of a creditor must always depend on the wisdom of the legislature."

The cases of *Davis's Lessee v. Livingston*, 6 Ohio, 225, and *Paine's Lessee v. Skinner*, 8 Id. 162, maintain the same views. And so in *Lessee of Perry v. Clarkson*, 16 Id. 573. The court, whilst they express their regret that administrators and purchasers should have acted upon a misapprehension of the law, and that mischiefs have resulted from such mistakes, say they conceive that the court has put a right construction upon the statutes, and that it was not in their judicial power to remedy the evil: See *Butler v. Palmer*, 1 Hill (N. Y.), 332; *North Canal Street Road*, 10 Watts, 351 [36 Am. Dec. 185].

It will be perceived that these decisions cover the point made in this case; and it is not perceived that it could make any difference whether the power to grant the license to sell was wholly annihilated or transferred to another court, as in either case the order could derive no force from the court that granted it; and the decisions cited do not attach any importance to the consideration that administrators were or were not required to report their proceedings to the court granting the order. We therefore think the sale was void for this reason also.

Certified accordingly.

AUTHORITY TO ADMINISTRATOR TO SELL REAL ESTATE of the deceased to pay debts barred by the statute is void: See *Heath v. Wells*, 16 Am. Dec. 383. Creditor's interest in the estate of a decedent is not of such a nature as to

preclude the legislature from repealing the laws authorizing sales of the estate for the payment of debts: *Ludlow v. Johnson*, 17 Id. 609.

THE PRINCIPAL CASE IS CITED to the point that, where the creditors of an estate have lost their remedy against the executor or administrator by lapse of time, courts will not license a sale of the real estate for the payment of the claims thus barred, in *Matter of Estate of Godfrey*, 4 Mich. 308; also in *Hoffman v. Beard*, 32 Id. 223.

COMSTOCK v. DRAPER.

[1 MICHIGAN, 481.]

INDORSER OF NOTE NEGOTIATED AFTER DUE holds it subject to all the equities between the original parties, whether he have notice thereof or not.

IF CONNECTION BETWEEN ORIGINAL ILLEGAL TRANSACTION AND NEW PROMISE CAN BE TRACED, if the latter is connected with and grows out of the former, no matter how many times and in how many different forms it may be renewed, it cannot form the basis of a recovery. Repeating a void promise cannot give it validity.

NOTE GIVEN IN SATISFACTION OF JUDGMENT RECOVERED UPON INVALID INSTRUMENT is subject to the same defenses which might have been made to the said original instrument.

ASSUMPSIT. Charles Draper sued Comstock upon a promissory note executed by Comstock and one Hadsell jointly and severally in October, 1840, payable to William Draper, and by him indorsed to plaintiff. Defendant in his plea stated that O. & A. Allen, on the eleventh of April, 1838, executed their promissory note, payable to Comstock at the Farmers' and Mechanics' Bank, at Pontiac; that said note, after being indorsed in blank by said Comstock and said Hadsell, was discounted by the bank. Said note not being paid, suit was brought against Hadsell, as indorser, and judgment recovered in October, 1839; that the note upon which this suit was brought was given to William Draper, who was then the receiver of said bank, under an order of the court of chancery, by Comstock and Hadsell, in October, 1840, in partial satisfaction of said judgment. After the note became due, William Draper transferred said note to Charles Draper, the plaintiff herein. Further, that said bank never had any legal existence. A demurrer to this plea was sustained by the court below, and judgment rendered for plaintiff. Said ruling and judgment the defendant now assigns as error.

Stevens, for the plaintiff in error.

Draper, in propria persona.

By Court, WING, J. As the case is presented by the pleadings, the defendant in error must be held to stand in the same

position with the payee of the note, and hold the note subject to the same defense that could have been made to it in the payee's hands. This results from his having received the note after it was past due. He is affected by all the equities between the original parties, whether he have notice thereof or not: Story on Bills, 197.

It is conceded that the law under which the Farmers' and Mechanics' Bank of Pontiac was organized was unconstitutional, and therefore the bank had no legal existence. This was fully settled in the case of *Green v. Graves*. In that case, suit was brought by the receiver of the Bank of Niles, on a note given to the bank. The receiver was not permitted to recover; as his principal, or the institution which he represented, could not recover, he could not.

In this case the note was given to William Draper, and was made payable to him or his order, but it was in fact made to him in his representative capacity, because he was receiver, and in payment or discharge of a debt due to the so-called Farmers' and Mechanics' Bank of Pontiac, and for no other consideration; he appears not to have had any interest in the note except in his character of receiver. He could not have owned the judgment, for, being in the name of the bank, there were no means of making a legal assignment; whatever may have been the force and effect of the judgment, standing in the name of the bank, there was no legal person with whom William Draper could contract for it. Then the consideration of the note being the judgment or the debt evidenced by it, could William Draper, as receiver—the representative of the bank—make a more binding contract with the debtors of the bank than his principal could make? I do not now speak of the consideration of the note; I simply put the matter upon the basis of power or want of power in the receiver to do what the bank could not do; and it appears to me the answer must be in the negative.

That the original note was void, because it grew out of a transaction with an illegal bank, and because the consideration of the note was illegal, cannot be disputed since the late decisions of this court, and particularly the decision in the case of *Hart v. Michigan State Bank*. The original parties were *participes criminis* and *in pari delicto*. If the suit on the original note had been defended on the ground that the consideration of it was entirely an illegal currency, and paid in furtherance of an illegal object, no judgment could have been recovered upon it; at the least, as the law is now understood

to be, and as it is stated in the case cited, and also in the cases of *State v. How*, and *McReynolds v. Goddard*, 1 Mich. 512. It was held in those cases that *ex turpi contractu non oritur actio*.

But it is insisted that the judgment was valid, and could not be impeached, and therefore constituted a good and legal consideration for the note; that no defense can be made to this note, which could not have been made to a suit on the judgment.

It is not quite easy to understand this doctrine as applied to this case, for it must be admitted that no suit could have been brought upon the judgment. There was not and could not be any person competent to sue. As to the general rule in relation to the force and effect of a valid judgment, there can be no doubt; and it perhaps may be conceded that if a judgment should be recovered upon a note to which fraud might have been a defense, and the judgment debtor, with full knowledge of the fraud, should give a note for the amount of the judgment, he could not contest the note upon any grounds; at all events, not upon the ground of fraud, merely personal to himself, and in which the public are not interested.

But the question now presented is one involving the illegality of the original note. It is not held to be void for the good of the makers, or on account of any merit in them, but on the ground of public policy, to protect the public against the violation of a positive statute.

It is a well-settled doctrine in the English and American books, that an illegal transaction cannot constitute a good consideration for a promise. If the connection between the original illegal transaction and the new promise can be traced, if the latter is connected with and grows out of the former, no matter how many times and in how many different forms it may be renewed, it cannot form the basis of a recovery, for repeating a void promise cannot give it validity.

In this case, no new element has entered into the new promise. The parties are substantially, and in law, the same. The consideration is the same, and the parties all have actual or constructive notice. The original unsoundness of the debt has flowed down to and is incorporated into the new promise. But it may be said the stream has been purified in its passage, that the judgment has purged the original taint, and the note is no longer connected with, and does not grow out of, the original illegal contract, but grows out of the judgment. Is this

true? The judgment can scarcely be said to have purified the stream; it may have dammed it, and stopped the continuous flow of the current, for the period the judgment existed as a judgment; but when the judgment was discharged, the dam was removed, the impurities of the fountain again flow on, and are carried along by the current and mingle with the new promise.

If we give all the effect that can be claimed for a judgment, and if we assume that it could not have been impeached by any proceeding at law or in equity; that the position of the plaintiffs in the judgment was impregnable so long as they maintained it, and their judgment was kept in full force; yet if their position was voluntarily surrendered by a discharge of the judgment, and their rights were deprived of the protection which the law had given to them, and a new note was taken for the original, or a part of the original, indebtedness, without any new consideration, can they complain that it should be held subject to the same defense which might have been made to the original note? If the judgment could be said to have imparted to the debt any support, did it not pass away with that by which it was sustained? I think it did. Considerations and principles of a higher character than such as would be applicable to the case of a private fraud (cited above) must prevail.

I was somewhat puzzled, at first, to discover how the effect claimed for the judgment was to be obviated; but on looking into the decisions of the king's bench, I think it will be found that no insuperable barrier is presented by the judgment.

In the case of *Ribbons v. Crickett*, 1 Bos. & Pul. 264, plaintiff furnished victuals to voters, which was unlawful. On being sued, defendant paid money into court, but the court would not allow it to be applied in payment of the illegal contract. Here the payment of money into court was an admission of every cause of action, either well or ill pleaded, which could be the subject-matter of a promise. This was a subsequent promise in effect, and of the most binding character; for paying money into court inures to the benefit of the plaintiff, even in cases where there is no consideration.

In *Aubert v. Maze*, 2 Bos. & Pul. 371, plaintiff had paid the difference in certain unlawful insurances, after the transaction was passed, and sued for the balances, and though arbitrators awarded a sum due, the court set aside the award. Lord Eldon held there was no difference between paying the money gener-

ally in the adventure, and paying at the express request of the defendant. That being one remove from the illegal transaction does not alter its nature; it is still connected with it.

In the case of *George v. Stanley*, 4 Taunt. 683, defendant lost money at play, and gave notes for it, which were passed to the plaintiff by the payee. They fell due, and he gave the plaintiff other notes in lieu thereof, and being unable to meet these, he confessed a judgment, execution was issued, and the money was made. After all this, the court suffered an issue to be made, to see if the plaintiff could be implicated or charged with notice.

In *De Begnis v. Armistead*, 10 Bing. 107, plaintiff and defendant carried on a theater in London, which was unlicensed; plaintiff was to pay certain matters, and defendant certain other specific expenses. Plaintiff paid, at the request of defendant, several sums for him. After the whole transaction was ended, a settlement was made, and defendant gave his acceptance for the sum due. Held, that as the debt originated in illegality, the subsequent settlement and acceptance were illegal and void.

These cases show that courts have gone far to sustain a defense to an illegal contract, or a contract remotely connected with the illegality, if it spring from or is based upon it. A plaintiff is not permitted to get into court through an illegal contract. The court will not in any way aid a guilty party. The contract is still executory.

If I am correct in these views, the conclusion follows that plaintiff in error should have judgment upon the demurrer.

Judgment reversed.

INDORSE OF NOTE AFTER MATURITY is subject to what equities: See *Baxter v. Little*, 30 Am. Dec. 707, and note.

CASES
IN THE
HIGH COURT OF ERRORS AND
APPEALS
OF
MISSISSIPPI.

FREMSTER v. MAY.

[13 SNEDES AND MARSHALL, 275.]

WHERE VENDOR RECEIVED BOND FOR TITLE, to be made when the purchase-money was paid, and that was payable in installments, the right to enforce payment is not distinct and independent from the ability to make title, and the defendant may set up, and show in bar of the action on the notes, a want of title in the vendor.

DEED GOOD IN FORM ONLY is not a sufficient compliance with the covenant to make "a good and perfect deed."

GOOD TITLE IS NECESSARY to make "a good and perfect deed."

ASSUMPSIT. The facts are stated in the opinion.

A. W. Dabney, for the plaintiff.

Guion and Baine, for the defendant.

By Court, CLAYTON, J. This was a suit upon the last of a series of notes given for the purchase-money upon the purchase of a tract of land. The vendor gave bond to make title upon payment of the purchase-money, and put the vendee in possession. Upon the trial, the defendant introduced proof to show that the plaintiff had not a valid title to the land. He asked the court to instruct the jury, "that to entitle the plaintiff to recover, he must be able to make the defendant a good, clear, and sufficient title to the land in the title bond mentioned." This charge was refused.

It is certainly true, as argued by the counsel of the defendant in error, that a vendee who has been put in possession of land, and who has accepted a deed with covenants of general

warranty of title, cannot defend a suit brought for the purchase-money, upon the ground of failure of consideration from defect of title, until he is actually evicted: *Heath v. Newman*, 11 Smed. & M. 201; *Dennis v. Heath*, Id. 206 [49 Am. Dec. 51]. But this rule does not apply where no deed has been executed, but only a bond given for title. In the latter case, the covenants are dependent, and the party cannot be forced to part with his money until the vendor is ready to make title.

We have decided that it is not a compliance with a covenant to make "a good and perfect deed," to make a deed good in form only. The title must be good to satisfy the undertaking: *Greenwood v. Ligon*, 10 Smed. & M. 615. If the vendee in this case were to pay the purchase-money and sue on the title bond, the vendor must show his title to be good, before he could be adjudged to have complied with his covenant. There is no reason why this should not be required in the present suit, so as to save the necessity of further litigation, and to guard the vendee against loss.

Where the vendee has accepted a deed, it is with an agreement, express or implied, that he will rely upon the covenants it contains; and he cannot resort to those covenants until there has been a breach.

For the error in refusing to give the instruction asked, the judgment will be reversed, and new trial awarded.

BOND GIVEN FOR TITLE.—The principle that "when the vendee received a bond for a title to be made when the purchase-money was paid, and that was payable in installments, the right to enforce payment is not distinct and independent from the ability to make title, and the defendant may set up and show in bar of the action on the notes a want of title in the vendor," which was asserted in the principal case, was afterwards overruled in the case of *McMath v. Johnson*, 41 Miss. 439 et seq. The court says: "So far as the case of *Peques v. Mosby* is to be considered as an infringement upon the general principle so clearly established, it has not been followed, and we do not feel inclined now to return to it. Similar remarks are applicable to the case of *Feemster v. May*. . . . This case seems to go upon a different ground from the case of *Peques v. Mosby*, and to be made to depend upon the fact that a bond was given for title, not upon the presumed intention of the parties, and it equally overlooks the important distinction already adverted to." The distinction adverted to was that which exists "between dependent and independent covenants, and is fully recognized in all the decisions above quoted. . . . When the covenants are dependent, the party seeking to enforce performance by the other must first perform or tender and offer to perform his own part of the agreement and demand performance by the other party before he can bring any action, at law or in equity, against him. . . . And if the covenants are independent, then each party relies on the covenants of the other party—no tender or offer of performance is required of either be-

fore resorting to an action, and neither can defeat the action of the other by showing a previous tender or offer of performance on his part and demand of performance by the party suing."

COVENANTS IN BOND FOR TITLE ARE DEPENDENT, and the vendee is not bound to pay the purchase-money until the vendor is ready to make title, and the covenant to make a "good and perfect" deed is not complied with by making a deed good in form only; the title must be good to save the covenant: *Wiggins v. McGimsey*, 13 Smed. & M. 532; *Mobley v. Keyes*, Id. 677.

VENDEE IN POSSESSION MAY RESIST an action for purchase-money without surrendering possession, if the vendor is unable to make title according to agreement; and the vendor in such case must rescind the agreement and sue for the possession: *Gans v. Renshaw*, 44 Am. Dec. 152, and note 156. Equity will compel the vendee to take a good title, subject to pecuniary charge, where adequate security is given, although it will not compel him to take a defective title: *Thompson v. Carpenter*, 45 Id. 681.

RICE v. MAXWELL.

[13 SMEDES AND MARSHALL, 239.]

NOTE EXECUTED BY BANKRUPT on condition that the creditor would withdraw his opposition to the bankrupt's discharge in bankruptcy, though executed after such discharge, is void for want of consideration.

ATTEMPT TO CONTRAVENE PUBLIC STATUTE is illegal, whether it is expressly prohibited by such statute or not.

ERROR from the Tippah county circuit court. The facts are stated in the opinion.

Watson and Craft, for the plaintiff in error.

Tarpley, for the defendant in error.

By Court, SMITH, J. The instruments, which were the foundation of the proceeding in attachment in the court below, were executed by Solomon C. Rice, and the plaintiff in error as his security, to secure a debt due by the former to the defendant in error, prior to the application of the said Solomon C. Rice for a discharge as a bankrupt, under the provisions of the act of congress passed on the nineteenth of June, 1841, establishing a uniform system of bankruptcy throughout the United States. The circumstances under which these instruments were executed appear to be as follow: Solomon C. Rice, in 1843, in the circuit court of the United States for West Tennessee, had filed his petition in bankruptcy, by which it appeared that he was the debtor of the defendant in error, who, on the eighteenth of May, of the same year, had proved his account and filed a dissent to the discharge of the petitioner as a bankrupt. The grounds alleged by the dissentient were, that the "petitioner had been

guilty of fraud and willful concealment of his property and rights of property, contrary to law." Afterwards, and pending the examination of the claim of the petitioner for a discharge, Levi Rice, plaintiff in error, proposed to the defendant that if he would withdraw his objections to the discharge of Solomon C. Rice as a bankrupt, that he (Levi Rice) would assume the debt which said Solomon C. owed him. The defendant in error, pursuant to this proposition, withdrew his objections, and the petitioner was discharged. In execution of this understanding, and in consideration of defendant's having withdrawn his objections as above stated, these instruments were given. The defense relied on was the illegality of this consideration. If the transaction was founded in fraud, or against the policy of the act above referred to, the consideration was illegal and the instruments void. The primary object of this statute was doubtless to afford relief to unfortunate debtors; but, in effecting this object, it was not less certainly the object of the national legislature to effect an equal distribution of the insolvent's estate, thereby securing equal advantages to the creditors. The execution of these instruments, and their subsequent payment by the bankrupt, would not lessen the distributive shares in his estate of his creditors; yet the suppression of facts producing such a result, and which might well be the case here, would directly defeat the objects of the statute.

In the case of *Cockshott v. Bennett*, 2 T. R. 763, all the creditors of an insolvent agreed to accept a composition for their respective demands, upon an assignment of his effects by a deed of trust, to which they were all to be made parties. One of these creditors refused to execute the deed until he had obtained from the insolvent a promissory note for the residue of his demand. In that case, it was obvious that the giving of the promissory note by the insolvent could not have effected the distributive shares of any of the creditors, but the note was held void as a fraud on the rest of the creditors.

In the case of *Payne v. Eden*, 3 Cai. 217, the note on which the suit was brought was given in consideration that the payee should become, under the insolvent act, a petitioning creditor for the maker. The note, as in the case at bar, was intended to secure a *bona fide* debt due to the payee by the maker, and the insolvent had a competent number of petitioning creditors exclusive of the payee; yet the court considered the transaction as founded in fraud, and contrary to the policy of the insolvent act. The case of *Wiggin & Wiggin v. Bush*, 12 Johns.

306 [7 Am. Dec. 324], is very similar to the case under examination in all of its facts. The note there in suit was given by the maker to the payee to induce him to withdraw his opposition to the discharge of the defendant under the insolvent law of New York. In that case, the defendant admitted to the payee of the note that he had not made a fair exhibit of his effects; in this case, the payee deposed that the maker had been guilty of "a fraudulent and willful concealment of his property," a list of which he had made under oath. In either case, it might have become a subject of inquiry, whether the party applying for the benefit of the insolvent or the bankrupt law had not committed perjury in not rendering a just account according to the oath taken by him as prescribed by the statute. The note was declared void in the hands of an indorsee, and the court said: "The transaction was, from its very nature, fraudulent, and opposed to true policy as well as the spirit of the act." It is insisted that, as the debt of Solomon C. Rice to the defendant in error was just, the subsequent recognition of its validity, and the express promise of the parties to pay it, were obligatory on the plaintiff in error.

In this case, the action is founded on the written contracts of the parties, and not on a subsequent and distinct promise to pay a pre-existing debt of the bankrupt. It is well settled that a contract, void for the illegality of the consideration, can never be rendered valid by a subsequent promise. Besides, the debt due to the defendant in error, by Solomon C. Rice, was annihilated by the decree in bankruptcy and his final discharge. A promise to pay this debt after his discharge was void for want of consideration: *Payne v. Eden*, 3 Cai. 218.

The ground assumed—that the issue submitted to the jury was not whether the instruments set out in the declaration were void on account of the want or illegality of the consideration, but whether they were executed and delivered to the defendant in error to secure the payment of a *bona fide* debt due by Solomon C. Rice to him, prior to his discharge as a bankrupt—does not appear to be true. Some confusion exists in the record. A replication to the first plea of the defendant appears to have been demurred to; and the demurrer was sustained, with permission to answer over. In a previous part of the record, an issue by consent appears to have been taken on the same plea. In a subsequent part a second replication exists, to which there is neither joinder nor demurrer, and would seem to have been abandoned, as issue was taken on the only plea

to which it could apply. We will not notice the exception taken to the charge of the court, as the verdict was manifestly erroneous; and for that reason the judgment must be reversed, and a new trial awarded.

THE RULE LAID DOWN IN THE PRINCIPAL CASE will also be found in *Sharp v. Teese*, 17 Am. Dec. 479.

DISCHARGE IN BANKRUPTCY will discharge a debt due from the husband to the wife: *Thoms v. Thoma*, 45 Miss. 263.

DISCHARGE IN BANKRUPTCY, WHEN DEEMED CONCLUSIVE.—A certificate of discharge in bankruptcy shall be deemed conclusive evidence in favor of the bankrupt of the fact and regularity of such discharge: *Stevens v. Brown*, 49 Miss. 597. A record of discharge of an insolvent debtor is conclusive that he complied with all things required by law to entitle him to a discharge, and cannot be inquired into collaterally: *Sheets v. Hawk*, 16 Am. Dec. 486, and note 488. The discharge cannot be contradicted in pleading, if the statute makes it conclusive as evidence: *Cunningham v. Bucklin*, 18 Id. 432. In Mississippi, it is claimed that the discharge is the judgment of the court, and stands upon the footing of other judgments, and a creditor has the right to contest it as other judgments are contested: *Stevens v. Brown*, 49 Miss. 597.

COOK v. RIVES.

[13 SNEDES AND MARSHALL, 323.]

ATTORNEY MAY PLEAD STATUTE OF LIMITATIONS in an action brought against him by his clients for money collected by the attorney but not paid over to the clients.

RELATION EXISTING BETWEEN ATTORNEY AND CLIENT is at the most but a constructive trust, and does not belong to that class of express, continuing, and subsisting trusts to which the statute is in equity held to be inapplicable.

SUIT by L. & M. Cook against N. E. Rives to recover seven hundred and twenty dollars and sixty-seven cents, money collected by the defendant while engaged as attorney for the plaintiffs. The defendant pleaded *non assumpsit* and the statute of limitations. The plaintiffs replied that the defendant failed to notify plaintiffs as to the time when the money had been collected. Defendant demurred. The demurrer was sustained, and judgment entered for the defendant.

N. G. and S. E. Nye, for the plaintiffs.

Brooke, for the defendant.

By Court, CLAYTON, J. Two questions are presented by the record in this case: 1. Whether, in an action against an attorney at law, for money collected by him for his client, he can

have advantage of the statute of limitations; 2. If he may under any circumstances do so, whether he can until he has notified his client of the collection of the money.

That the attorney may have the benefit of the statute in such case, is decided in *Stafford v. Richardson*, 15 Wend. 302, and *Kinney's Ex'rs v. McClure*, 1 Rand. 287. The relation between attorney and client does not belong to that class of express, continuing, and subsisting trusts, to which the statute is, in equity, held to be inapplicable. It is at most but a constructive trust: Angell on Lim. 199.

The authorities are not uniform on the point whether the fraudulent concealment of the cause of action by the defendant will at law take a case out of the statute. They are collected and collated in Angell on Lim., 188, 202.

Those which hold that the replication of such fact will not be sufficient to prevent the operation of the statute are more in accordance with the decisions of this court. In the exposition of statutes, our course has been to adhere closely to their terms and to introduce no exceptions beyond those contained in the statute itself: *Smith v. Westmoreland*, 12 Smed. & M. 663; *Boa v. Stanford*, 13 Id. 93 [51 Am. Dec. 142]. There is no express exception in the statute which would embrace this case; to introduce an implied one would contravene the rules heretofore laid down by this court.

It may also be observed that the rule which allows such exception is itself subject to a modification, which renders it inapplicable in this case. If the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he cannot avail himself of the exception: Angell on Lim. 195. A case could scarcely occur of a collection of money by an attorney, in which the fact would not be discovered by reasonable diligence. The payment ought to be indorsed upon the execution, and filed with the records. If that should not be done, inquiry of the sheriff or of the defendant would lead to a knowledge of the fact.

The replication in this case, moreover, is not of a fraudulent concealment, but that the defendant did not notify the plaintiff of the collection. To ingraft this as an exception upon the statute would carry the doctrine further than any court, to our knowledge, has heretofore done.

The judgment is affirmed.

TRIMBLE v. TURNER.

[13 SNEDES AND MARSHALL, 243.]

LAW REQUIRES MAN TO DEVOTE WHOLE OF HIS PROPERTY, with some trivial exceptions, to the payment of his debts.

FRAUDULENT CONVEYANCES ARE VOID.

SHERIFF'S SALE DEVOID OF GOOD FAITH IS VOID.

DEED OR OTHER INSTRUMENT OR TRANSACTION WHICH IS SET ASIDE BECAUSE OF FRAUD as to existing creditors becomes wholly void, and cannot stand in the way of subsequent judgment creditors.

WHERE IT APPEARS THAT PUBLIC FORCED SALE is but the consummation of an agreement made between the judgment creditor and a third party, who bought for the benefit of the judgment debtor, and suffered the property to remain in the possession of the judgment debtor, who paid the price when the same fell due, such sale will be considered fraudulent as to creditors, and the property purchased will be subject to the other debts of the judgment debtor.

WHEN PERSONS ARE PREVENTED FROM BIDDING AT PUBLIC FORCED SALE, by the purchaser or persons acting under him, upon representations that the property is to be bought for the benefit of the judgment debtor, such sale will be deemed fraudulent as to creditors of the judgment debtor.

AFTER PROOF OF COMBINATION BETWEEN PARTIES, the acts or declarations of one are evidence against the others.

WHEN TWO CREDITORS INSTITUTE PROCEEDINGS TO SET ASIDE FRAUDULENT CONVEYANCE, and obtain judgment, the property will be decreed to satisfy the prior lien first, and if the creditor having the latest judgment has a mortgage on the same property for the same debt, which was secured prior to either judgment, his lien of mortgage will be preferred to the judgments.

ERROR from the Carrollton district chancery court. The facts are stated in the opinion.

Cothran, for Hemingway.

Acee and E. S. Fisher and D. C. Glenn, for Trimble.

Sheppard, for Booth.

By Court, CLAYTON, J. This was a bill filed in the district chancery court at Carrollton. It states that Trimble, the complainant, had obtained judgment against Turner for three thousand two hundred and forty dollars, on which execution had been issued, and returned no property. That defendant, Hemingway, was likewise a judgment creditor in his own right, and as executor of Samuel Bell, deceased, but that, from priority of enrollment of his judgment, he was entitled to preference over Hemingway. It further states that executions had been issued upon the two judgments of Hemingway, and had been levied on twelve slaves as the property of Turner, to which

William Booth set up claim. That Booth had given bond to try the right of property to those slaves, in the circuit court of Carroll, and that the issue was still pending. It charges that the claim of Booth is fraudulent, makes Turner, Booth, and Hemingway parties, prays that the title of Booth may be set aside, and the slaves declared subject to his judgment, preferably to those of Hemingway.

Booth and Turner deny the alleged fraud. Hemingway sets up in his answer, as well as by cross-bill, that he has a deed of trust on the same property, duly recorded, and free from objection, that is, older than any of the judgments against Turner, and by virtue of which he claims priority.

The evidence shows very clearly that Turner had become wholly insolvent as early as 1843, perhaps earlier, and that as far back as 1840, one George D. McLean had recovered judgment against him for nearly four thousand dollars. A part of this judgment had been paid, but in 1843 a balance of two thousand five hundred dollars was still due upon it. The plaintiff transferred it to the Planters' Bank of Tennessee, and the bank constituted E. R. McLean, of Carroll county, its agent for the collection of this claim. On the second of October, 1843, the negroes in controversy were sold under this judgment, and purchased by E. R. McLean, the agent, at the price of two thousand dollars. According to his testimony, there was an agreement or understanding between Booth and himself before the sale, that he was to bid off the negroes, and Booth was to have them. On the same day, Booth drew a bill in his favor on Hoopes & Marye, of New Orleans, for two thousand five hundred and forty dollars, payable on the fourth of March following, which appears to have been the amount due on the execution.

On the evening of the same day, on their way home from Carrollton, Booth told Strong that he had undertaken to befriend Turner's family, and save the property for them; that he had drawn a bill to meet the purchase of this property, and that he expected to be able to meet the bill from the sale of Turner's crop of cotton, then growing, and from a sale of a part of the negroes. Joliffe proves that in the winter of 1844 he bought five of the negroes from Turner, under a written authority from Booth, for which he gave two thousand dollars, and which he paid to Booth, partly in March, and a part in May, 1844. In a letter from Mr. Booth, dated tenth of October, 1843, to Hoopes & Marye, he refers to the bill he had

drawn upon them, tells them not to accept it, and "that he gave the draft for the purchase of fifteen negroes at execution sale, in order to save something for a numerous and dependent family; that the amount is to be placed in his hands anterior to its maturity, by the friends of the family, when he is to make a bill of sale to them." McLean states that the negroes were worth, at the time of his purchase, from three thousand to four thousand dollars, and there is abundant proof that there was no change of possession up to the time of the last levy of the execution. It is also in proof that on the day of the sale to McLean there were active exertions used by Turner to prevent any bidding by other persons; and that some time after the sale to Joliffe, he stated that the amount paid by Booth had been refunded to him. The sale itself was made in two lots of seven and eight respectively; not with any particular reference to families, but apparently with a view to exclude competition.

The principal question is, whether this sale was fair or fraudulent. The proof very clearly shows a combination or understanding between Turner and Booth, and Booth and McLean, before the sale under the execution. The result of that understanding was a sale at a very reduced price, virtually upon credit; the money really either paid by Turner or refunded by him to Booth, and the property left, without interruption, in the possession of Turner. Did this combination hinder, delay, or defeat other creditors? To state the proposition is to answer it.

The object of the whole arrangement was to secure the property to the family of Turner, at the smallest possible price. That price was the amount of the execution under which they were sold. The sale was not made to raise cash, because the rules of law were departed from, and the sale made really upon credit. It took place at a time of year when money is most scarce, nominally for cash, but really upon a credit to Booth, long enough to enable the crop then maturing to be carried to market and sold. It is almost demonstrably certain that if the sale had been postponed until the bill drawn by Booth in payment fell due, the slaves would have brought double as much; for five of them were sold in the interval for the same amount which the whole fifteen brought at the sale made by the sheriff.

The law requires a man to devote the whole of his property, with some trivial exceptions, fairly to the payment of his debts. It will not tolerate any subterfuge or device which is

intended to divert it from that purpose. The form of the contract or transaction gives it no validity, when good faith, which is necessary to the obligation of all contracts, is absent. A sale under execution confers no exemption from this principle, in behalf of those who participate in such device: *Stovall v. Farmers' and Merchants' Bank, Memphis*, 8 Smed. & M. 306 [47 Am. Dec. 85]. Whilst McLean had the undoubted right to enforce the execution of which he had the control, he had not the right so to use it as to injure others. The transaction was, in effect, an effort to cover the title to a much larger amount of property, under the execution, than was necessary to satisfy it. No feeling of sympathy, nor any benevolence of motive, upon the part of those engaged in such a transaction, can redeem it from condemnation of the law.

The position that a fraudulent conveyance will not be set aside in favor of subsequent creditors, even if it were granted to be true (and about which it is not necessary to express an opinion), cannot avail the defendant in this instance. Hemingway's deed of trust is older than the sale. And if a deed, or other instrument or transaction, be set aside because of fraud as to subsisting creditors, it becomes wholly void, and cannot stand in the way of subsequent judgment creditors: *Young v. Pate*, 4 Yerg. 164; *Reade v. Livingston*, 3 Johns. Ch. 481.

After proof of the combination between the parties, the acts or declarations of one are evidence against the others: *Stovall v. Farmers' and Merchants' Bank*, 8 Smed. & M. 306 [47 Am. Dec. 85].

The sale cannot be permitted to stand, and the title must be declared subject to the debts of Turner. As between the complainant, Trimble, and the defendant, Hemingway, the latter is entitled to priority of satisfaction, both in his own right and as executor of Bell. The lien of his deed of trust is prior in time to the judgment of Trimble, and consequently entitled to precedence.

It may be proper to add that the principle which protects sales at execution from the presumption of fraud, where the original owner is left in possession, does not apply in this case, because, as between Booth and the other parties, the contract of sale was a private one. Not much weight, however, is attached to this circumstance, because there is abundant testimony apart from any presumption.

The decree of the court below will be reversed, and the cause remanded for further proceedings, in accordance with this opinion.

FRAUDULENT CONVEYANCE.—A conveyance taken with intent to allow the grantor to escape just claims is fraudulent and void as to one holding such claims, even though full value be paid: *Lowry v. Pinson*, 20 Am. Dec. 140; *Garland v. Rice*, 15 Id. 756. In order to render a conveyance fraudulent and void, there must be fraud on the part of the grantee as well as on the part of the grantor: *Anderson v. Roberts*, 9 Id. 235. A fraudulent intent against one or more creditors will make such conveyance fraudulent to all, and therefore it may be set aside at the instance of subsequent creditors: *Hutchison v. Kelly*, 39 Id. 250, and note; *Gilbert v. Hoffman*, 26 Id. 103.

EFFECT OF FRAUDULENT CONVEYANCE.—A fraudulent donor or vendor will not be permitted to set up his own iniquity to avoid his own act or deed: *Sickman v. Lapeley*, 15 Am. Dec. 596; *Reichart v. Castator*, 6 Id. 402; *Stewart v. Iglehart*, 28 Id. 202.

RETENTION OF POSSESSION, EVIDENCE OF FRAUD.—A sale of slaves, of which the vendor thereafter continued in possession, is fraudulent and void as against a subsequent purchaser for value in good faith and without notice: *Rocheblave v. Potter*, 14 Am. Dec. 305. Retention of possession on a sale of personalty renders the sale invalid as to creditors: *Batchelder v. Carter*, 19 Id. 707. A transfer of chattels, unaccompanied by a change of possession, is void as against creditors: *Boardman v. Keeler*, 15 Id. 670; *Mason v. Baker*, 10 Id. 724; *Swift v. Thompson*, 21 Id. 748; *Clark v. French*, 39 Id. 618, and note; *Mills v. Warner*, 47 Id. 711; *Fleming v. Townsend*, 50 Id. 318.

EVIDENCE OF FRAUD IN CONDUCT OF PARTIES.—Direct proof of a combination in a conveyance to defraud creditors cannot, in general, be expected, but from all the circumstances attending the transaction the court may infer the conveyance to be fraudulent: *Bradley v. Buford*, 2 Am. Dec. 703. And the conduct of parties to a sale before and after, as well as at the time of the sale, may be inquired into for the purpose of ascertaining whether or not such sale was *bona fide*: *Reels v. Knight*, 19 Id. 184. Any irregularity on the part of the officer conducting the sale, or the parties to the sale, whereby competition was prevented, will be good cause for setting aside the sale: *Hopton v. Swan*, 50 Miss. 545; *Farr v. Sims*, 24 Am. Dec. 396; *Mills v. Rogers*, 13 Id. 263; *Smith v. Greenlee*, 18 Id. 564.

NELMS v. STATE OF MISSISSIPPI.

[13 SNEDES AND MARSHALL, 500.]

PERSON IS NOT ABSOLUTELY DISQUALIFIED FROM ACTING AS JUROR, who has formed or expressed an opinion respecting the guilt or innocence of the prisoner, when such opinion is based on mere rumor.

PERSON IS DISQUALIFIED FROM SERVING AS JUROR when he has formed or expressed an opinion from what he has heard some one say respecting statements which had been made by some of the witnesses, notwithstanding the fact that the juror stated his opinion would not influence his verdict, but that he would be governed by the evidence.

WITNESS CANNOT BE IMPRACHED BY STATEMENT WHICH HE MADE before a magistrate on a previous occasion, when a hearing of *habeas corpus*, involving the same matter, took place, unless such statement was read to the witness and signed by him.

WHEN PRECISE WORDS OF DYING MAN ARE STATED and offered in evidence, the impressions made on the mind of the witness, who was present and heard the statements made by the deceased, cannot be inquired into.

AFTER DYING DECLARATIONS OF DECEASED HAVE BEEN ADMITTED, evidence showing what the deceased said at other times, respecting the subject-matter, is competent to impair the credibility of the dying declaration, and all that the deceased said respecting the matter should be presented to the jury.

CONVERSATIONS BETWEEN OFFICERS IN HEARING OF JURY, in which one of the officers stated that "it was a worse case than Dyson's," and the other stated that "public opinion was against the accused," constitute good cause for setting the verdict aside.

COMMUNICATIONS BETWEEN OFFICER AND JUROR, touching the subject of their deliberations, will be good cause for setting the verdict aside.

JUROR SHALL NOT BE ALLOWED TO IMPEACH VERDICT by disclosing his own misconduct, but he is competent to testify to the improper attempts made by a party to the suit, or one who may be the instrument of the party, to influence the jury.

APPEAL from the Madison county circuit court. The facts are stated in the opinion.

Etelle, Tarpley, and Barton, for the appellant.

D. C. Glenn, attorney-general, for the state.

By Court, **SHARKEY, C. J.** The prisoner was indicted and found guilty of the murder of Jesse Price. He brings up his case on eight bills of exceptions, seven of which were taken on points ruled during the progress of the trial, and the last to the decision of the court in overruling a motion for a new trial, in which the testimony is set out, and seven reasons assigned in support of the motion.

The several points raised were thoroughly investigated by counsel, and the arguments on both sides were so lucid and forcible, that the labor of deciding is rendered comparatively light.

The first exception was taken to a refusal to sustain a challenge for cause to a juror. When called to answer questions, he stated that he had formed and expressed an opinion from what he heard one Mansfield say some of the witnesses had told him, though the juror had not heard any of the witnesses say anything on the subject; that his opinions were not such as would influence his verdict, but he would be governed by the evidence.

This point is not, certainly, free from difficulty. The question is one of very frequent occurrence, and the decisions are numerous, though not entirely consistent. It is a question on

which it seems difficult to lay down a definite and precise rule, which can be applied as a test in all cases. The great principle is, that every man who is accused has a right to demand a trial by an impartial jury of his country; a jury whose minds are free from prejudice and from bias.

Cases may arise in which it is next to impossible to procure a jury of this description; but even in such cases, the nearer we can approach to the principle the better. It seems to be generally conceded that an opinion formed and expressed on common rumor will not disqualify a juror. Strictly speaking, this is a departure from the true principle, but it is a departure which may be rendered necessary in certain cases. It should be avoided, however, if possible. The mind which has received impressions from any source cannot be said to be entirely free and impartial, since the false impression must be removed before the true one can be made. It may often happen that a crime may be of such a character as to become a matter of general notoriety throughout a whole county. In such cases, it may be absolutely necessary to take jurors who have formed an opinion on mere rumor. But if an opinion be formed and expressed on information derived from a reliable source, the juror is certainly objectionable. An opinion from having heard the evidence, or from having conversed with the witnesses, is of that character. And an opinion formed on the information of one who heard the witnesses testify, or speak of the subject, may be equally a ground of objection, if the juror had confidence in the statement he received. An opinion so formed is not based on common rumor. In *Ex parte Vermilyea*, 6 Cow. 562, Judge Woodworth said it was good cause of challenge, that a juror had formed and expressed an opinion from a knowledge of the facts. The juror had heard the testimony on a former trial, and was held incompetent. And in the same case, *People v. Vermilyea*, 7 Id. 108, it was said that the mind of the juror should be in a state of neutrality as to the person and the matter to be tried.

In the trial of Aaron Burr, Chief Justice Marshall said it was one of the clearest principles of natural justice, that a juryman should come to the trial of a man for life with a perfect freedom from previous impressions; and he accordingly held that jurors who had formed opinions from newspaper publications and common rumor were incompetent. On this ground, many of the jurors were set aside, and many of them had formed opinions only from current rumor: 1 Burr's Trial,

370. In *People v. Mather*, 4 Wend. 229 [21 Am. Dec. 122], a juror was set aside who had formed and expressed an opinion from newspaper publications, and from common rumor, although he declared that he was prepared to weigh the evidence and decide accordingly. In this case, all the authorities are reviewed, and the rule settled on what was regarded as the weight of authority. In *McGowan v. State*, 9 Yerg. 184, the court laid down this rule: that if the juror has heard the circumstances of the case, and, believing the statements to be true, has formed, or formed and expressed, an opinion, he is incompetent. In that instance, the juror had formed his opinion, not, as it was said, upon rumor merely, but from a detail of circumstances by persons in whom he confided. This question was very fully considered at the present term, in *Sam v. State*, 13 Smed. & M. 189, when jurors were held incompetent who had formed decided opinions, one from common rumor, and the other from having heard the case argued by counsel. In the case of *State v. Johnson*, 1 Miss. 392, it was decided that an opinion formed on common report did not disqualify the juror, though the court evidently regarded the point as worthy of great consideration, and leaves the inference that an opinion formed otherwise than on common report would be sufficient cause of challenge. On these authorities, and in view of the principle above noticed, we do not feel prepared to approve the decision of the court, in holding that the juror was competent.

The second bill of exception raises this question: Was it competent to discredit a witness by introducing his statement made on the trial of a *habeas corpus*, as taken down by the vice-chancellor, before whom the trial was had? The statute does not make it the duty of the judge, on such a trial, to take down the evidence, unless one of the parties desire it, and then he is only required to take down the material facts: Hutch. Code, 1001. We do not think an examination taken down under this statute can be read for such a purpose, unless it be read over to, and signed or approved by, the witness: 1 Phill. Ev. 293.

The third bill of exceptions relates to the declarations of deceased made *in extremis*. They were made under all due solemnity. The deceased declared that he knew he could live only a few hours at most, perhaps not more than an hour. The declarations were made to Ostun, who asked the deceased who shot him. Deceased replied "that Nelms shot him;" when some one standing by asked if it was Samuel H. Nelms,

to which deceased replied, "Yes." The question was repeated, and deceased indicated assent by a forward inclination of the head. The witness, Ostun, was then asked, "If deceased did not so express himself as to convey the idea that it was a mere opinion, and not a thing within the actual knowledge of the deceased?" and he was asked also, "What Jesse Price had said to him before on the subject?" To these questions the district attorney objected, and the objections were sustained. The question is, Should the court have permitted the witness to answer these questions?

Evidence of this description is classed under the head of hearsay evidence, though perhaps it stands somewhat on a different footing. The awful situation of the party in prospect of immediate dissolution is supposed to be as powerful on the conscience as the obligation of an oath. Such evidence is only admissible under a rule of necessity, and constitutes the only case in which evidence is admissible against the accused, without an opportunity of cross-examination. The leading rules in regard to the admissibility of such evidence are laid down in note 453 to Phillips's Evidence, and in 2 Starkie's Evidence, 366, 367. It is said the court must try the competency of the deceased, and the jury his credibility. Various questions may arise after the court shall have admitted the evidence. The jury may question its credibility, and consider its effect. As it is given and received under peculiar circumstances, great caution is called for in the application and use of such evidence. To this end, it is important that all attending circumstances should be well weighed by the jury. The degree of self-possession, of observation, and recollection of the deceased, should be ascertained. The state of mind arising from a sense of his critical situation, added to his suffering condition, may produce indistinctness of memory, and all these may tend to shake the confidence of the jury. It is said by an eminent writer, cited 2 Stark. 366, that "sometimes the declaration is of a matter of judgment, of inference, and conclusion, which however sincere, may be fatally erroneous. The circumstances of confusion and surprise connected with the object of the declaration are to be considered with the most minute and scrupulous attention; the accordance and consistency of the facts stated, with the other facts established in evidence, is to be examined with peculiar circumspection."

There is great force in these remarks. It may often happen that the party, without being perfectly certain, would ascribe

the act to some suspected person, when, if the grounds of his suspicions could be known, they would be unsatisfactory. An enmity which had been but recently exhibited by threats would be very likely to lead the mind of a wounded person to a thorough conviction that the wound had been inflicted by the person who made the threat, and he might consequently speak of it as a fact. Hence the necessity for that degree of caution which is said to be necessary in the use of such evidence. The object of the first question seems to have been to ascertain the true meaning of the deceased. Usually, the opinions of a witness are not admissible, but the peculiarity of this description of evidence, the absolute necessity for confining it within proper limits might, under certain circumstances, seem to require a departure from the strict rule. If the declarations had been equivocal or ambiguous, perhaps the impression made on the mind of the witness who heard them might have been a proper subject of inquiry. It seems to be sufficient if the substance of the declarations be given: *Montgomery v. State*, 11 Ohio, 424. A witness who is called to prove what a deceased witness swore on a former trial need only state the substance, and such testimony very much resembles the proof of dying declarations. To give the substance is but to give the ideas conveyed to the mind of the witness which he clothes in his own language. But there is no occasion for a resort to proof of the substance of what the dying man stated, since the witness gives the language used. The meaning of that language can be determined by the jury.

We do not, therefore, feel prepared to say there was error in refusing to permit the witness to answer the first question; but, in view of the foregoing rules, we are well satisfied that there was error in refusing to allow him to state what the deceased had said to him on the same subject at another time. If such previous conversation was had, which gave a different version of the transaction, it was important that the jury should have known what was said. To exclude it from them was to exclude the means of trying the credibility of the evidence, a question which it was indispensably necessary for them to consider. They could not otherwise justly weigh the declarations; it was compelling them to take them without the attending circumstances, and perhaps depriving them of the means of judging with that circumspection which the law requires. Important light may have been thus shut out.

We shall touch but one other question. Several of the jurors were introduced to testify in support of the motion for a new

trial, who stated that two of the officers who had them in charge spoke of the enormity of the offense, by saying that it was a worse case than Dyson's, and one of them said that public opinion was against the accused. To my mind, this presents a very satisfactory and even a conclusive reason for a new trial. The purity of trial by jury must be strictly guarded. The verdict when rendered should command entire confidence; whatever may detract from that confidence must weaken the security which is felt by the community in this mode of trial. I adhere to the doctrine laid down in *Hare v. State*, 4 How. (Miss.) 187, which seems to me to apply here. The officer is required by the nature of his duty, as well as by an oath, not to speak to the jury himself on the subject of their deliberations, or to permit others to do so.

This ceremony is a mockery, if a violation has no other effect than to subject the officer to punishment. If he may speak to them himself he may permit others to do so, and the door is thus thrown open to tampering, and the safety of trial by jury is invaded to an alarming extent. The duty of the officer is prescribed for the protection of the accused. If improper influences have been employed, it is but a poor boon to say to him that the officer is liable. The officer may be willing to incur the punishment for the sake of gratifying his wishes or for reward. One who thus violates his duty and his oath should be subjected to the severest possible penalties, but that does not purify the verdict; it should be set aside. It is dangerous to permit a verdict to stand which is liable to suspicion. The jury should not know the opinion of any one; and more especially should they be kept in ignorance of public opinion, which is often the result of prejudice.

The general rule is, that a juror shall not be allowed to impeach the verdict by disclosing his own misconduct, or his motive, or opinion, or that of his fellows; but this is a different question. The jury are not involved in the misconduct of the officer; that is a matter over which they have no control. A juror may be received to testify to improper attempts of a party to the suit to influence the minds of the jury: *Denn ex dem. Chews v. Driver*, Coxe, 166. On the same principle, we should be allowed to state the misconduct of the officer who may be the instrument of the party.

Judgment reversed, and cause remanded.

SMITH, J., concurred.

CLAYTON, J. I concur fully in the result of the foregoing opinion. But I do not concur in that part of it which relates to the affidavits of the jurors in regard to the conduct of the officers who attended them. In *Prussel v. Knowles*, 4 How. (Miss.) 95, this court said the rule is well settled "that a juror shall not impeach his verdict." Policy and prudence require, in my opinion, an adherence to the rule thus laid down. In all other respects, the opinion in chief meets my cordial approbation.

COMPETENCY OF JURORS.—No principle or rule of practice tending to insure the purity and impartiality of jurors should in the slightest degree be abandoned or impaired: *Monroe v. State*, 5 Ga. 85. A person who has formed an opinion from common rumor as to the guilt or innocence of the accused, which it would require evidence to remove, is not an impartial and competent juror to try the accused: *Cotton v. State*, 31 Miss. 504, which cites the rule laid down in the principal case. Every juror who sits in a cause should have a mind entirely free from all bias or prejudice of any kind whatsoever, and if the juror is prejudiced in any manner, he is not a fit or proper person to sit in the box: *People v. Reyes*, 5 Cal. 347. If a juror has expressed an opinion against the party from his knowledge of the cause, and not from any ill-will or favor, it will be good cause for challenge: *Ex parte Vermilyea*, 6 Cow. 555. A juror is disqualified if he has formed or expressed an opinion relative to the merits of the case: *Boardman v. Wood*, 3 Vt. 570. A juror having been asked the question, "Have you formed and expressed an opinion?" and thereupon answered, "Yes," it is not error for the court to refuse to ask further, "What is the ground of that opinion?" The first answer clearly disqualifies the juror, no matter what the second answer might be: *Martin v. Mitchell*, 28 Ga. 332. Where a juror stated that it would require proof to change the opinion then existing in his mind, but that he could try the case impartially, the court held that he was incompetent: *People v. Gehr*, 8 Cal. 359. One who has unqualifiedly expressed his opinion upon the question of the guilt or innocence of the accused is incompetent to serve as a juror: *People v. Edwards*, 41 Id. 640. The action of the court in sustaining the challenge to a juror in a criminal case cannot be excepted to or reviewed by the appellate court: *People v. Colson*, 49 Id. 679; *People v. Atherton*, 51 Id. 495. In the case of *Commonwealth v. Knapp*, 20 Am. Dec. 491, it was considered a good ground of challenge for cause, that a juror should say on his *voir dire* that he did not know how much he might be influenced by his preconceived opinion. An opinion founded on a knowledge of the facts, or on information derived from those acquainted therewith, furnishes a good cause of challenge to a juror: *People v. Mather*, 21 Id. 122, and note 153; *Smith v. James*, 36 Id. 521, note; *Freeman v. People*, 47 Id. 238. A person who has formed an opinion in reference to the guilt or innocence of the accused, which it would require testimony to remove, is incompetent to serve as a juror: *Cotton v. State*, 31 Miss. 509; *Williams v. State*, 32 Id. 398; *Ogle v. State*, 33 Id. 383; *Alfred v. State*, 37 Id. 296.

OPINION OF WITNESS.—Opinions of witnesses are never received as evidence where all the facts on which they are founded can be ascertained and made intelligible to the court or jury: *Clark v. Fisher*, 19 Am. Dec. 402, and note 408; *Rambler v. Tryon*, 10 Id. 444; *McKee v. Nelson*, 15 Id. 384; *Jefferson*

Ins. Co. v. Colheal, 22 Id. 567. Where a witness testified to a conversation, and related the same with a good deal of minuteness, it was held that he could not testify as to what he understood to be meant by the language used: *Hibbard v. Russell*, 41 Id. 733.

JUROR CONVERSING ABOUT CASE will constitute good cause for the granting of a new trial. Where two jurors charged with the consideration of the case conversed with persons and commented upon the testimony adduced, and discussed the merits of the case, it was held good grounds for setting aside the verdict and granting a new trial: *Blalock v. Phillips*, 38 Ga. 216; *Sparks v. Wakely*, 7 Weekly Dig. (1878), 80; see *Hilton v. Southwick*, 35 Am. Dec. 255, and note discussing the subject of misconduct of jurors as ground for new trial at length; *State v. Watkins*, 21 Id. 717; *Dana v. Roberts*, 1 Id. 87.

IMPEACHMENT OF VERDICT BY JUROR.—The testimony of jurors themselves is not admissible to impeach their verdict upon the ground of misconduct: *Cluggage v. Swan*, 5 Am. Dec. 400; *Forester v. Guard*, 12 Id. 140, and note 142; *Apthorp v. Backus*, 1 Id. 26; *Clum v. Smith*, 5 Hill, 560; *Williams v. Montgomery*, 60 N. Y. 648. But a juror may impeach the verdict, where a motion has been made for a new trial, to show that there was such misconduct on the part of the jury as would vitiate the verdict: *Cranford v. State*, 24 Id. 467, and note 475.

CHAMPLIN v. DOTSON.

[18 SNEDES AND MARSHALL, 558.]

VENDEE WHO IS PUT INTO POSSESSION cannot afterwards acquire a title and set it up in opposition to the vendor.

VENDEE WHO BUYS IN OUTSTANDING INCUMBRANCES, or procures another party to do so, for the benefit of the vendee, will not be permitted to set up an adverse title under them against the vendor.

VENDEE WHO PURCHASES OUTSTANDING INCUMBRANCES will only be entitled to be credited for the amount which he expended in purchasing the incumbrances. If he should claim more than this, a court of equity will interpose to prevent a recovery.

APPEAL from the Natchez southern district chancery court. The facts are stated in the opinion.

W. S. Wilson, for the appellant.

H. T. Ellett, for the appellee.

By Court, **SHARKEY, J.** The bill was filed to enjoin defendant from setting up a defense at law, in a suit brought against him by complainants; and from the decision of the chancellor sustaining a demurrer to the bill, this appeal was taken.

The defense sought to be enjoined arises out of a special contract, made between the defendant and one Flowers, who had indorsed the notes sued on to the testator of the plaintiffs. Flowers sold a tract of land to the defendant for five thousand

dollars, and procured a title to be made by Harman, in whom the legal title then was, under which defendant took possession, and has continued to hold it. Flowers, at the time he sold to defendant, or afterwards, made a written agreement to this effect: "That if the land should, at any time, be seized or sold under execution on judgments, either against Harman or himself, he would refund to defendant any money he might have received from him on the notes, and would give up such of the notes as might remain unpaid."

Flowers sold the land to defendant in 1840, and it was afterwards levied on and sold by the sheriff of Claiborne county for one hundred and twenty dollars, under an execution which issued on a judgment against Harman for four hundred and forty-eight dollars. The contract of Flowers is now set up as a defense to a suit on three of the notes. If the defendant had lost the land by the sheriff's sale, this contract would have afforded him protection against the payment of the purchase-money. But it is alleged that the land was purchased at the sheriff's sale by the attorney of the plaintiff in execution, to whom defendant applied, very soon after the sale, to be substituted in his stead as purchaser, which the attorney agreed to, on condition that the whole amount of the judgment should be paid off. Defendant acceded to this proposition, made the payment, and directed the sheriff to make a deed to Harding, which was done, and Harding afterwards conveyed to defendant, without either having given or received any consideration. The bill is very vague on this branch of the case; had it been more specific and certain, much of the difficulty which arises in reference to the conduct of the defendant might have been obviated. If defendant was substituted as purchaser at the sheriff's sale, he must have been present at the sale, and the substitution must have taken place before the sale was consummated. The defendant must be regarded as the purchaser at sheriff's sale. The fact may, in truth, be otherwise, but the allegations in the bill will not warrant a different conclusion; then what is his condition?

It is worthy of remark, in the first place, that the defendant was a purchaser from Flowers, with notice of the judgment incumbrance. As against Harman, he had no other protection than such as was afforded by the covenants in the deed, but they were not binding on Flowers, and this contract was given as a cumulative security. It was taken in view of existing incumbrances, and was intended to protect the defendant against

loss. In agreeing to refund if the land should be sold, we can only understand the party as providing for the contingency of a loss by such sale. The possibility of a purchase by the defendant at such sale, or an extinguishment of incumbrances by him, was a contingency that was overlooked, and not provided for by the terms of the contract. The contingency, however, has happened, and the question is, How does it affect the rights of the parties? The defendant is the vendee of Flowers. In that capacity, his defense arises under a special contract. The principle is well settled that a vendee will not be permitted to buy in incumbrances, and set up an adverse title under them against his vendor: *Holridge v. Gillespie*, 2 Johns. Ch. 30; Sugd. Vend. 567; *Harper v. Reno*, Freem. Ch. 323; *Hardeman v. Cowan*, 10 Smed. & M. 486. In this instance, we can regard the defendant in no other light than as purchaser of the incumbrance. He did not bid, it is true, but was substituted to the bid, and at his request the conveyance was made to Harding, whose name must have been introduced into the transaction only for the purpose of disguising its true character. The case is in all respects like that of *Harper v. Reno*, above cited. The case of *Hardeman v. Cowan*, *supra*, covers every principle involved in this case. Land was sold by Cowen to Hardeman, which was subject to judgments, and it was afterwards sold under execution. It was purchased by a brother of Mrs. Hardeman, for her benefit. The purchaser paid with his own money. On bill by Hardeman to rescind, and a cross-bill for a specific performance, it was decided that the title acquired by Mrs. Hardeman could not be set up in opposition to the vendor; that it was in effect but a purchase of an outstanding title, which only entitled the vendee to the repayment of the money laid out. The vendee is here, as in *Hardeman v. Cowan*, endeavoring to set up an incumbrance of which he had notice, and here, as in that case, the title comes nominally through a third party; the consideration, however, passed from the defendant, which makes the case even stronger against him than was the case against Hardeman.

It is a principle of equity jurisprudence, then, that a vendee cannot buy the land under an outstanding incumbrance, and set up an adverse title; he can only claim to be refunded the amount paid by him. If he should claim more than this, a court of equity would interpose to prevent a recovery. The defendant, however, sets up a special contract, and claims under it a right to resist the payment of the purchase-money. That he should not be permitted to claim more than an abate-

ment equal to the amount paid by him, is, under the circumstances, most obviously true; but is the interposition of a court of chancery necessary to restrain him? or may the court of law, in which the defense is made, accomplish the same thing? This question is one of considerable difficulty. The respective claims for jurisdiction are very nearly balanced. A party may be enjoined from setting up a defense at law, on the same principle that will prohibit him from setting up an unconscientious demand, if the court of law cannot exclude the defense, or give it a proper limit. The condition of the contract has been forfeited, the land was sold under execution, and by the terms of the contract, the notes should be given up. The intention of the parties may be very questionable; it seems to have been intended as a mere contract of indemnity, yet it is more in terms, and courts of law cannot generally so enlarge the contract by construction which is not expressed. Courts of equity, too, must be governed by the real contract; but it is said they may examine it not merely as a court of law does, to ascertain what the parties have in terms expressed to be the contract, but what is in truth the real intention of the parties, and carry that out. But in so doing, they must look carefully at what the parties have expressed, because, in general, they must be taken to have expressed what they meant: *Liddell v. Sims*, 9 Smed. & M. 596.

But though it be true that a court of chancery cannot depart from the terms of a contract so as to vary it, yet it may go further than a court of law in mitigating the consequences of a breach of contract, and it may reach and condemn the means by which one party has obtained the advantage of another. On the contract of vendor and vendee, it raises a confidential relation, and imposes corresponding duties which will be enforced against an advantage at law. It will not allow the vendee to avail himself of his legal title acquired under an outstanding incumbrance, although he might do so in a court of law, where legal titles only are recognized. On a bill by the defendant to rescind this contract, a court of chancery would assuredly refuse its aid. It ought not, therefore, to allow the same thing to be virtually accomplished in a court of law. After the contract was made, the defendant seems to have shaped his conduct so as to bring the case within the latter by disregarding the rights of the vendor. The remedy in chancery, moreover, recommends itself by being more certain, and more ample and complete. For these reasons, we think it is the proper tribunal to take cognizance of the question. If the de-

fendant, by answer, can place the case in a different aspect, he may make his defense available. The decree must be reversed, the injunction reinstated, and the case remanded.

BUYING ADVERSE TITLES AND INCUMBRANCES.—A vendee cannot acquire an adverse title and set it up against the vendor: *Cromwell v. Craft*, 47 Miss. 44; *Wade v. Thompson*, 52 Id. 367. A vendee cannot buy up an abandoned contract between his vendor and a third person, for the purpose of defeating his vendor's title: *Wood v. Perry*, 1 Barb. 114. The vendee and the vendor are estopped from buying in a title adverse to the other, unless it is for the purpose of mutual protection: *Aston v. Robinson*, 49 Miss. 353. If the vendee buy in an outstanding title or incumbrance, he shall be considered as doing so for the protection of the vendor's title, and will only be credited on the purchase-money for what he has advanced, and can recover of the vendor the amount so expended: *Kirkpatrick v. Miller*, 50 Id. 521; *Dyer v. Britton*, 53 Id. 270. The vendee's extinguishment of an incumbrance inures to the benefit of the vendor, and the vendee is entitled to a proportionate abatement of the purchase-price: *Meadow v. Hopkins*, 33 Am. Dec. 140; *Fowler v. Cravens*, 20 Id. 153; *Greene v. Munson*, 31 Id. 605; *Larkin v. Bank of Montgomery*, 33 Id. 324.

STATE v. COMMERCIAL BANK OF MANCHESTER.

[13 SMEDES AND MARSHALL, 509.]

PRIVATE CORPORATION CREATED BY LEGISLATURE MAY LOSE ITS FRANCHISES by a misuser or non-user of them, and they may be resumed by the government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture.

BANK MAY MAKE GENERAL ASSIGNMENT of its property and effects, and such assignments, if in other respects fair, will be sustained.

TEMPORARY SUSPENSION OF OPERATIONS, or the simple act of assignment of a corporation, is not a misuser of its chartered privileges. Neither will constitute a non-user, because both are within the exercise of a corporate franchise. Either might place the bank in a situation which would end in a non-user for the want of means with which to carry on its operations.

CONTINUED SUSPENSION OF PRINCIPAL CORPORATE FRANCHISES, and a failure to perform the implied conditions upon which the charter was granted, amount to a non-user, which would be good cause of forfeiture.

APPEAL from the Yazoo county circuit court. The facts are stated in the opinion.

R. S. Holt and E. C. Wilkinson, for the appellant.

W. R. Miles, George S. Yerger, and Battaile, for the appellee.

By Court, CLAYTON, J. This was an information in the nature of a *quo warranto* against the bank for a violation of its charter. The bank pleaded its charter. Three replications were then filed, setting out the alleged acts of violation. The first avers

that the bank had assigned to trustees "all of its property of every kind and description, in trust, to sell the property and collect the debts, and pay all the liabilities of the bank, and then to divide and pay over the surplus to the stockholders, in proportion to their shares." The second avers "that on the — day of October, 1845, the bank, with the intention of never again discounting notes, issuing bills for circulation, or otherwise carrying on banking operations, assigned to certain persons, as trustees, to liquidate and wind up its affairs and business, all its property of every kind and description, in trust," etc. The third avers "that the bank, fraudulently and with intent to violate the law, assigned all its bills receivable," etc.

To these several replications, the following rejoinders were filed, first: "That it is stipulated in said assignment that the trustees therein may, whenever it is necessary, use the name of said bank in bringing or defending suits, or any other acts necessary to be done in its name; and that in and by said assignment, choses in action to the value of half a million of dollars were assigned; that said bank was and is not insolvent, but was then paying, and continues to pay, specie on all its demands; that nearly all its debts were paid before the filing of the information; and that it has since continued to elect its officers and perform other corporate acts." The second rejoinder is in substance the same.

The third avers, "that it did not make said assignment fraudulently and with the intent to violate the law, but that, at the time of the making thereof, a *quo warranto* was pending against it, and the same was made for the benefit of its creditors and stockholders, and to prevent the extinguishment of its assets, in case judgment had been rendered against it; but that said judgment was finally rendered in its favor."

To this rejoinder, there was a general demurrer, on which judgment was given for the bank, and the case thence comes to this court.

The demurrer admits that the bank is not insolvent; that it has paid, and continued to pay, specie on all its debts; that it elects its officers, and performs other corporate acts; and that the assignment was not made fraudulently, or with intent to violate the law, but to preserve its assets from extinguishment. The single question for decision, therefore, is whether an assignment made for these purposes, and going to this extent, amounts in itself to just cause of forfeiture.

It is very properly conceded, by the argument on the part of

the state, that the assignment is not, of itself, either a dissolution of the corporation, or a surrender of its franchises. The authorities very clearly sustain these positions: *Boston Glass Manufactory v. Langdon et al.*, 24 Pick. 53 [85 Am. Dec. 292]; *State of Maryland v. Bank of Maryland*, 6 Gill & J. 230 [26 Am. Dec. 561]; Angell & Ames on Corp. 656. But it is contended that the act may be cause of forfeiture and of seizure of the franchises of the bank.

"A private corporation, created by the legislature, may lose its franchises by a misuser or non-user of them; and they may be resumed by the government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture:" *Terrett v. Taylor*, 9 Cranch, 51; *Com. Bank of Rodney v. State*, 4 Smed. & M. 492; *People v. Bank of Hudson*, 6 Cow. 218. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation. Is the assignment in this case either such a misuser or non-user of the corporate franchise as amounts to cause of forfeiture?

It is the settled doctrine of this court that a bank may make a general assignment of its property and effects, and such assignment, if in other respects fair, will be sustained. It has been argued that as such assignment is legal, it cannot have the effect to cause a forfeiture of charter. To some extent this is true, but not to the extent to which it is pushed in argument. It is certainly not such a misuser of its franchises, as in and of itself will amount to cause of forfeiture. But then it may place it out of the power of the bank to comply with the terms, and fulfill the purposes and perform the conditions upon which its charter was granted, and thus prove a ground of forfeiture for non-user. Every suspension of the use of its franchises for a limited time does not amount to a breach of condition and consequent ground of forfeiture.

A reasonable allowance must be made for peculiar circumstances and exigencies. A substantial compliance is all that is required. The fluctuations of commerce may sometimes make it incumbent on a bank to curtail its discounts, or entirely to suspend them, in order to preserve its integrity. The less is thus sacrificed to the greater. The furnishing of a sound and convertible medium of currency is the primary object in the incorporation of banks; the accommodation of those who deal with them, and the benefit of the stockholders, are the secondary objects. It is essential to their preservation and safety that they should cease to issue a circulation when they have

not the means to redeem it. It is right for them to withhold for a time, until they can gather strength for subsequent operations. Hence, expansions and contractions are inseparably interwoven with the banking system. It has its seed-time and its harvest. A reasonable discretion must, therefore, of necessity, be allowed to a corporation in the exercise of these powers, on which its very existence depends. It is by no means easy to draw a line which would define the boundary between legitimate acts of prudence, and those which would be an abuse of its franchises. Each case must rest somewhat on its own circumstances: *Commercial Bank of Natchez v. State*, 6 Smed. & M. 623.

In this case the question arising upon the demurrer is, whether the assignment of itself is cause of judgment of forfeiture. It was made for the purpose of collecting its debts, paying its own liabilities, and then paying the surplus to the stockholders. The organization of the bank was still kept up by the election of its officers. It was made to prevent the extinction of its assets, in the event of a judgment against it, in the *quo warranto* then pending. The suspension of its banking powers during the pendency of the proceeding could have no effect against it, because the Briscoe act required such suspension. Its debts were all paid, except a trifling amount. After the termination of the *quo warranto*, as there were no creditors, the trustees, under the assignment with the assent of the stockholders, might have made a reassignment of the assets, and the bank would then have been restored to its former condition, and might have resumed operations. This, however, does not appear to have been done.

We have already stated that the simple act of assignment was not a misuser of its chartered privileges. It could not be a non-user, because it was an exercise of a corporate franchise. It might, however, place the bank in a situation which would end in a non-user, for the want of means with which to carry on its operations. But it has not in itself that effect.

The pleadings present the naked question whether the mere assignment is cause of forfeiture. We think it is not, because, although of necessity it produces a temporary suspension of some of the corporate powers, it leaves others still in active operation. The exercise of the latter may place the bank in a situation to resume the former, at a subsequent period. A continued suspension of the principal corporate franchises, and a failure to perform the implied conditions upon which the

charter was granted, amount to a non-user which would be cause of forfeiture. Looking, however, to the case as now presented upon the record, we cannot see any act or omission upon the bank which would warrant a judgment of seizure against it.

The judgment of the court below is affirmed.

HOW CORPORATION MAY BE DISSOLVED.—A banking corporation, when ordered by its board of directors, has the power to voluntarily dissolve itself and close its business, and to distribute a portion of its capital and earnings among the stockholders: *People v. Olmstead*, 45 Barb. 644. In the case of *Rossman v. McFarland*, 9 Ohio St. 369, it was held that no bank should take possession of the assets in insolvency, and that all assignments which were in conflict with the commissioners should be void. In the case of *Slee v. Bloom*, 10 Am. Dec. 273, the court held that a corporation could be dissolved by a surrender of its corporate rights. And if a corporation suffer acts to be done which destroy the end and object for which it is instituted, it is equivalent to a surrender of its rights. In the case of the *State v. Real Estate Bank*, 41 Id. 109, it was held that the charter of a corporation would be forfeited if the trust upon which it was granted should be broken and the corporation be perverted. See also note to same case.

MERE NON-USER WILL NOT DISSOLVE CORPORATION.—Mere non-user of the corporate powers will not constitute sufficient ground for the forfeiture or dissolution of the corporation: *Rollins v. Clay*, 33 Me. 132; *Slee v. Bloom*, 10 Am. Dec. 273; *Attorney-General v. Bank of Niagara*, Hopk. Ch. 354; *Russell v. McClellan*, 14 Pick. 63. The mere non-user by a corporation is not a surrender, and the court cannot presume a surrender from non-user or a failure to exercise its privileges, unless the charter contains some express provision to justify such inference: *State v. Real Estate Bank*, 41 Am. Dec. 109, and note referring to other cases appearing in this series. It has also been held that mere insolvency of a corporation is not sufficient to annul its charter: *State Bank v. State*, 12 Id. 234; *John v. Farmers' etc. Bank*, 20 Id. 119; *State v. Bailey*, 16 Ind. 46; *Hoyt v. Sheldon*, 3 Bosw. 267.

WILLFUL NON-USER, EFFECT OF.—In the case of *Terrett v. Taylor*, 9 Cranch, 43, it was held that a corporation may, by willful non-user or misuser, forfeit its franchises, which may be seized by the state on a judgment upon information filed and prosecuted by the state: *Paschall v. Whitset*, 11 Ala. 472; *Washington & C. Road v. State*, 19 Md. 239; *Commonwealth v. Union Fire and Marine Ins. Co.*, 4 Am. Dec. 50; *Mumma v. Potomac Co.*, 8 Pet. 281; *Briggs v. Penniman*, 18 Am. Dec. 454; *State v. Real Estate Bank*, 41 Id. 109, note, referring to other cases appearing in this series.

PRINGLE v. DUNKLEY AND WIFE.

[14 SWEDES AND MARSHALL, 16.]

BEQUEST MADE BY TESTATOR bequeathing all his personal estate equally to his wife and three children to be held equally so long as his wife should continue his widow, but in the event of her marrying, her interest should go to the children, is not a bequest in restraint of marriage, but is strictly a limitation of the estate of the wife.

THE facts are stated in the opinion.

George Wood, and D. C. Glenn, attorney-general, for the appellant.

John M. Duffield, for the appellee.

By Court, SHARKEY, C. J. Dunkley and wife petitioned the probate court for a distributive share of the estate of James G. Pringle, and obtained a decree in their favor, from which this appeal was prayed. The question to be determined depends on the last will and testament of James G. Pringle. The testator divided his estate, consisting of personal property, equally between his wife, Elizabeth, and his three children, to be held equally "so long as the said Elizabeth shall continue my widow, but upon the event of her marrying, then her interest to go to my heirs, above named, in equal portions." The widow remained in possession of the estate for several years, without having renounced the provision in the will in her favor. She afterwards married Dunkley, and then applied for her distributive share.

It is contended that this was a bequest in restraint of marriage, or *in terrorem*, and is therefore upon a void condition, and on this ground, probably, the court made its decree in favor of the widow. The doctrine invoked does not apply in this case, for even if this were a bequest on condition, the bequest over, after the marriage, would take the case out of the rule that a condition *in terrorem* is void. This is strictly a limitation, a gift to the wife during her widowhood, and such limitations have been uniformly sustained as valid. The right of the widow ceased at her marriage, and the children of the testator took the whole property from that time: *Richards v. Baker*, 2 Atk. 321; *Sheffield v. Orrery*, 3 Id. 282; 1 Roper on Legacies, 526, 527, 556-558; 1 Jarm. on Wills, 731. The widow cannot complain of the hardship of this disposition. By our statute, she could have renounced the provision in her favor within six months. During that time she had her election either to take what was given by the will, or to renounce it and take her distributive share under the law. She acquiesced in the will, and must abide by the consequences.

Judgment reversed, and cause remanded.

BEQUESTS IN RESTRAINT OF MARRIAGE.—A limitation over in a devise of an estate in fee by a husband to his wife in case "she should ever marry again," is not illegal and void as being in restraint of marriage: *Snider v. Newson*, 24 Ga. 139. The same doctrine was held in the cases of *Labarre v.*

Hopkins, 10 La. Ann. 466; *Walsh v. Matthews*, 11 Mo. 131; *Dumey v. Schoefler*, 24 Id. 170; *Dumey v. Sasse*, Id. 177; *Gough v. Manning*, 26 Md. 347; *Little v. Birdwell*, 21 Tex. 597; *Hughes v. Boyd*, 2 Sneed, 512; *Hawkins and Wife v. Skeggs, Adm'r*, 10 Humph. 31; *Plympton v. Plympton*, 6 Allen, 178; *Commonwealth v. Stauffer*, 51 Am. Dec. 489, and note; *Coppage v. Alexander's Heirs*, 38 Id. 156, to which is appended a rather copious note presenting several adjudicated cases which tend to support the rule laid down in the principal case.

WHITE v. TROTTER.

[14 SMEDES AND MARSHALL, 80.]

JUDGMENTS OF SISTER STATE MAY BE IMPEACHED FOR FRAUD, and all proceedings under such judgment will be subject to the same rule when a claim to specific property is made through such a medium.

CONTRACT IS DEEMED FRAUDULENT which gives one creditor preference over others, if the party to be benefited by the contract knew of the insolvency of the obligor. This knowledge must be shown by the party who attacks the contract.

JUDGMENTS ENTERED SOLELY FOR GIVING PREFERENCE to one creditor over another, stand on the same ground as contracts of like character.

SALE WHICH APPEARS DOUBTFUL OR SUSPICIOUS cannot be set aside as fraudulent in fact, until such fact be established.

FRAUD MAY BE PROVED BY DIRECT OR CIRCUMSTANTIAL OR PRESUMPTIVE EVIDENCE, but the proof must in all cases be satisfactory.

WHEREVER CONFIDENCE IS REPOSED, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage.

PURCHASER AT SHERIFF'S SALE, who stands in the relation of attorney in fact to both debtor and creditor, is estopped from purchasing, for his own benefit, the property offered at such sale, on the principle that such purchase is against public policy.

MORTGAGEE OF PROPERTY DISPOSED OF AT SHERIFF'S SALE has the right to have such sale set aside, when it is void as to both debtor and creditor.

RULE IN CASES AT LAW, THAT PARTY MUST LOSE ALL ADVANTAGES GAINED BY FRAUD, as well as the money which may have been paid by him, does not apply in equity, when the party asking to set aside a purchase has been benefited by the discharge of incumbrances or the payment of debts.

BILL to enforce a mortgage lien. The facts are stated in the opinion.

Watson and Craft, for the appellant.

Barton and Stearns, and F. Anderson, for the appellees.

By Court, SHARKEY, C. J. This appellant filed her bill in the vice-chancery court to enforce her mortgage lien on certain slaves in the hands of the defendant Silas F. Trotter. From a

very complicated case we shall extract such facts as seem to be necessary to a correct understanding of our conclusion.

It seems that the defendant Joseph Trotter, a resident of Tennessee, was indebted to the complainant, a resident of Virginia, in about the sum of twenty-seven thousand dollars, on a debt that had been contracted with complainant's husband in his life-time. Trotter was also largely indebted to other persons. He held a plantation, containing one thousand seven hundred and sixty acres of land, in the parish of Caddo, Louisiana, on which he had near sixty slaves. On the fifth of May, 1841, he duly mortgaged this property, to secure the following debts, then existing, to wit: The sum of ten thousand dollars to the heirs of G. W. Mayers, of Alabama; the sum of twenty-two thousand dollars to F. W. & T. Boyd, of Virginia; and also ten thousand dollars to Kuhman, Abernethy, & Hanna, of New Orleans. On the twenty-second day of May, 1841, he mortgaged the same property to complainant, to secure her debt. It seems that he had also made a prior mortgage in favor of Miles S. Watkins.

The bill alleges that the debts in the first mortgage mentioned were nearly paid off by the latter part of the year 1845, and it seems to be established that the balance then due Watkins was three thousand and fifty-eight dollars, and to Boyd four thousand dollars. Watkins had procured an order of seizure under his mortgage in June, 1845, but no sale seems to have taken place under it. On the twenty-ninth day of November, 1845, Trotter confessed a judgment in favor of Mayers for the amount of her debt, eleven thousand dollars, with interest, in which judgment it was ordered that the mortgage be recognized and enforced. On the first day of December, 1845, a writ of *fieri facias* issued on this judgment, which commanded the sheriff of Caddo parish to make the money out of the property mentioned in a description annexed, being the mortgaged property, or of the personal estate of Trotter. On the second of December, being the day after the execution issued, the sheriff seized the property. On the third of December, the sheriff served a notice on Trotter, as required by the law of Louisiana, that in three days he should advertise the property for sale, and Trotter having waived the three days' notice, the sheriff proceeded to advertise. His advertisement bears date the second of December. Silas F. Trotter, as the agent of his father, required that the property should be appraised, which was accordingly done, and the valuation

amounted to twenty-six thousand nine hundred and eighty-four dollars. The law required that the sheriff should give thirty days' notice, and the sale was made on the third of January, 1846, at which Silas F. Trotter became the purchaser at eighteen thousand dollars, which was a little over two thirds of the valuation, property so offered being bound to bring two thirds of its appraised value. Previous to the sale, Silas F. Trotter, as the agent of the defendant in execution, directed the sheriff in writing to sell all the property levied on in "block," as it is called, that is, in one parcel, and in that way it was sold. Trotter, the purchaser, paid no money, but reserved enough in his hands to discharge the incumbrances of Boyd (four thousand dollars) and Watkins (three thousand and fifty-eight dollars), and being the agent also of Mrs. Mayers, he receipted on the execution in her favor for the balance of his bid, to wit, ten thousand nine hundred and forty-two dollars, and took a conveyance from the sheriff.

This is a general outline of the history of the case in Louisiana. Silas F. Trotter afterwards removed the negroes, or part of them, to this state, as to which this bill was filed, to subject them to complainant's mortgage, on the ground that the purchase by Trotter was fraudulent and void, and conferred no title. The circumstance that Trotter derived title under an execution sale in Louisiana, makes no difference if he was a fraudulent purchaser, for even the judgments of a sister state may be impeached for fraud, and all proceedings under judgment must be subject to the same rule, when a claim to specific property is made through such a medium. Now, we are to inquire whether the purchase was made in fraud, either actual or constructive.

First, in regard to the evidences of fraud in fact, which, if it exist, may affect the rights of the parties to it in a manner different from the effect of a mere constructive fraud. Here, we must examine the particular circumstances which have been relied on as evidence of such fraud. It is charged in the bill that Joseph Trotter conceived the scheme of fraud early in 1845, and procured the co-operation of other creditors, and of his son Silas F., also. A proposition to compromise with complainant, by giving certain property, is relied on as entitled to much weight, inasmuch as by it complainant was induced to believe her claim would be settled in 1846, and misled or thrown off her guard as respected the necessity of pressing her claim. This proposition was made in a written communication to Pearsall, a joint debtor with

Trotter, in order that it might be laid before Mrs. White's agent, which was done. But it was not accepted, nor was any definite answer given. White's reply was that he would see Pearsall again on the subject, or write to him. This was in October, 1845. On the twenty-eighth of January, 1846, Thomas W. White, the agent of Mrs. White, the complainant, wrote to Joseph Trotter, from Huntsville, informing him (Trotter) that he was then at leisure, and would be pleased if a time of meeting, either in New Orleans or on Red river, could be appointed "for the purpose of making a settlement, and carrying out something of the views proposed by you to me, through our friend Mr. Pearsall, last fall." Then it seems a reply to the proposition for compromise was delayed several months, and when it was made, it was not an acceptance of the terms, but only for a settlement in which might be carried out "something of the views proposed." Trotter was not bound to wait an indefinite period for an answer to his proposition. White, the agent, was at fault for his delay. The judgment was not confessed for more than a month after the proposition for a compromise; and, moreover, most of the property offered to White by the proposition lay in Tennessee, and was not subject to the judgment. The circumstance of this proposition having been made, is entitled to but little weight in establishing fraud. It was not of itself calculated to mislead, and could not have done so if ordinary diligence had been used by White, the agent.

In the next place, we come to consider the confession of judgment by Trotter in favor of P. D. Mayers as tutrix or guardian. This circumstance is not entirely free from grounds of suspicion, it is true, but still of itself was not fraudulent as to complainant; it did not postpone her lien, nor did it give Mrs. Mayers a preference, as she already held a prior mortgage, and was therefore entitled to preference. The judgment was not necessary as to the mortgaged property, because the mortgagee was entitled to have the mortgage foreclosed, by the law of Louisiana, by order of seizure and sale. By the judgment, however, a preference was obtained as to certain property on the plantation, work-horses, farming utensils, etc., not covered by the mortgage. But there is no complaint that Mrs. Mayers' debt was not a just one; the confession of judgment was, therefore, not of itself fraudulent, and the particular circumstances attending the confession of judgment are not shown. Then, in the next place, are we authorized to conclude that there was fraud from the circumstances attending the levy

of the execution and the sale? The judgment was confessed on the twenty-ninth of November, 1845; execution issued on the second of December, and was levied on the same or the next day. This, to be sure, indicated haste on the part of some one, still it may have been all right. The defendant in execution was entitled to three days' notice of the levy before the property was advertised; this notice he waived, but Crain says this was done at his instance, as he wished to press the sale, in order that he might not be detained a month longer from going to New Orleans. It manifested a willingness to accommodate not very common with defendants in execution. It shows that Trotter was very willing to have his property sold, and it may be that he had a motive in it. The next step in the progress of the matter was made by Silas F. Trotter, as the agent of his father, under a full power of attorney, dated long anterior. He addressed a request to the sheriff that he should sell all the property seized "in block," which was complied with. This is relied upon as a circumstance clearly indicative of fraud, and therefore requires to be closely examined. It seems to be the privilege of the debtor to have all property levied on sold together: Code of Practice, art. 676. And it appears from the testimony that it is not unusual to sell property in that way.

We must judge of this matter from the proof, and not from what might be our own opinion of the probable advantages or disadvantages of a sale made in this way. There is considerable conflict in the testimony. Some of the witnesses say the property sold best in this way; others think differently. One or two of them think it could not have been sold at all in separate parcels. Crain is very positive that it could not; but his opinion is founded on the law of Louisiana, which provides that incumbered property shall not be sold if the highest and last bid is not sufficient to discharge the incumbrance: Code of Practice, art. 684. This would seem to be true if all the property sold is incumbered by prior mortgages, unless perhaps where each article had been mortgaged at a specific price; but he omitted to notice the fact, that part of the property levied on was not subject to a prior mortgage. The work-horses and mules, the farming utensils, the corn, the fodder, and the stock, valued at five thousand dollars by some of the witnesses, was not subject to mortgage. His rule of necessity could not apply to this property. That much, at least, might have been sold separately. But although this may look like a suspicious circumstance, we are not authorized by the testi-

mony to say that the result would have been different, or that this is a circumstance which proves fraud. Crain says that Silas F. Trotter, as agent of his father, wished to have the property sold separately, but by his advice Trotter was induced to give the direction to the sheriff to sell it all together, and his credibility is not impeached. His attitude was somewhat peculiar, it is true; he frequently counseled with Trotter, as to the mode of conducting the sale. Trotter was attorney in fact for Mrs. Mayers, the creditor, and also attorney in fact for his father, the debtor, and it seems to have been understood in the neighborhood that he would purchase the property. He had employed Crain to collect the Mayers debt; but we are not, therefore, authorized to reject the testimony of Crain. We must, then, regard it as true that Silas F. Trotter did wish the property sold separately.

Prior to the sale, the property was appraised by disinterested persons. The law provides for such appraisement when it is desired, and it provides also that it shall not be sold unless it will bring two thirds of its value, or if it do not, that it shall be sold on a credit: Code of Practice, arts. 680, 681. The appraisers were examined, and testified to the fairness of their valuation; they deny that any influence was exerted or attempted by Silas Trotter. At the sale, a number of persons were present, and Silas Trotter bid eighteen thousand dollars, being a little over two thirds of its value. No efforts were made to keep off bidders, and some of the witnesses say that if Trotter had not bid, no one else would have done so. The sale cannot be questioned, then, on the score of inadequacy in price, since the requirements of the law have been met. But it is said the amount of incumbrances was not truly shown at the time of sale. The law makes it the duty of the sheriff, when he sells, to produce and read a certificate from the parish judge, stating the incumbrances on the property. It seems the credits on the prior mortgages were not shown. This might be a very material circumstance under our law; but we have already seen that property in Louisiana must bring the amount of prior incumbrances, when sold under a junior lien, and then the purchaser is authorized to hold in his hands the amount of the prior incumbrance: Code of Practice, art. 683. It must have been known, therefore, that the prior incumbrances did not amount to the sum bid; otherwise the property could not have been sold. Bidders could not have been deterred on this account. Silas Trotter paid no money on his purchase. He retained in his hands three thousand and fifty-eight dollars, the balance of

Watkins's claim, and four thousand dollars, the balance due Boyd, and, as the agent of Mrs. Mayers, credited the execution with the balance of his bid, ten thousand nine hundred and forty-two dollars. By law, he was authorized to retain the amount due on the prior mortgages, and Crain says, as attorney for Mrs. Mayers, he consented to the credit, as Trotter was her authorized agent, and acted, in this particular, under a special agreement with Mrs. Mayers.

And here it is necessary to state what that agreement was, and thus show Mrs. Mayers's attitude in this transaction. On the twenty-ninth of May, 1845, Mrs. Mayers, in Franklin county, Alabama, executed the power of attorney to Silas F. Trotter, giving him full power to collect the money due her from Joseph Trotter, either by proceeding on the mortgage or otherwise. This power of attorney was executed in her capacity of guardian of her children, in which capacity the money was due her. The agreement seems to have been to this effect, that if Silas F. Trotter should become the purchaser of the property at the sale under the mortgage, Mrs. Mayers would extend the time of payment, provided he would give his bonds, with his mother and Joseph Trotter as surety. Under this agreement it was that Silas entered the credit on the execution, and accordingly executed the bonds or notes, with a mortgage on the personal property to secure their payment. In her answer, Mrs. Mayers alleges that she desired the mortgage on Joseph Trotter's property to be foreclosed, because of his embarrassed condition and the anxiety she felt about the debt. Her agreement with Silas Trotter is the only circumstance on which she can be implicated in the scheme of fraud, if it existed. It seems from a letter from her counsel in Alabama that she had great confidence in the integrity of both Joseph and Silas Trotter; and she has participated in no way to bring about an unfair sale, or one which might result to the benefit of Silas Trotter, unless in the manner spoken of. Nor does it seem that she even knew anything of complainant's claim, unless that knowledge be fixed on her constructively by the knowledge of her agent.

Another circumstance relied on as evidence of fraud is the inability of Silas F. Trotter to pay so large an amount. It seems, however, that he owned some fifteen or twenty negroes, and he also borrowed money to pay off the senior claims; and as he made an agreement for an extension of credit with Mrs. Mayers, the circumstance of his poverty is certainly not very conclusive.

We have thus noticed the material circumstances of the case; they are of themselves not inconsistent with entire fairness; and if the complainant had been fully cognizant of the proceeding, manifestly there would be no solid ground of complaint. But it is mainly on her ignorance of the proceeding that the charge of fraud is rested. Without fault in her, this could not have been so. She, it seems, had an agent in New Orleans, and that agent says that Joseph Trotter had promised to let him know if proceedings should be instituted for the sale of the property. When this promise was made does not appear, nor does it appear how much reliance was placed upon it. It is a circumstance, to be sure, which tends to show a secret design, but not sufficient to sustain the charge.

For the law of this case, we are referred to articles 1973 and 1979 of the civil code. These articles seem to refer to mere contracts between individuals, and furnish nothing very satisfactory as applicable to the present case. The last article provides that contracts shall be deemed fraudulent as to creditors, when the obligee knows that the obligor is in insolvent circumstances, and when such contract gives to the obligee, if he be a creditor, an advantage over other creditors. The case of *Bauduc v. His Creditors*, cited from 4 La. 247, was a decision based on article 1979. It was a contest between a mortgagee and other creditors who had been postponed. It decides that a debtor, in a failing or insolvent condition, cannot give a preference to a creditor who takes the security, knowing the obligor to be insolvent or unable to pay his debt, but it must be clearly shown that the preferred creditor knew the fact of insolvency. The case of *Ingham v. Thomas*, 6 Id. 83, but reiterates the same principles. The cases, moreover, decided that article 1979 establishes a rule of presumption, which makes contracts so entered into *prima facie* void. Another case is cited from the same book, *McManus v. Jewett*, Id. 538, which, in addition to the above principle, also decides that this presumption of fraud does not arise as against one who is not a creditor, but an original purchaser for a fair consideration. The decision in *Rhodes v. Beaman*, 10 Id. 363, is one of a similar character to those above mentioned. The case of *Barrett v. His Creditors*, 4 Rob. (La.) 408, decides that mere insolvency will not be sufficient to justify the setting aside the contract which prefers one creditor to another, unless it also be shown that such preferred creditor had a knowledge of the insolvency, and also that such contracts are not liable to be

impeached or set aside after the lapse of one year. And it seems from the case cited of *Prats v. His Creditors*, 5 Id. 288, that a preference obtained even by the formalities of the inscription of a judgment procured for the purpose, stands on no higher ground than a mere contract.

These principles seem to be established by the cases, to wit: that a contract is deemed fraudulent which gives one creditor a preference over others, if the party to be benefited by the contract knew of the insolvency of the obligor, which knowledge must be shown by the party who attacks the contract; that the contract must be attacked within one year; that the rule only applies as between creditors, and does not extend to cases in which there was no indebtedness; and lastly, that judgments extended solely for the giving of a preference, stand on the same ground with contracts. None of these decisions seem to reach the case before us. Silas F. Trotter was not a creditor, and therefore the legal presumption does not arise as against him; he can only be reached by proof of an actual fraud. Mrs. Mayers was a creditor, and her judgment might fall under the rule established, but there is an absence of proof on the subject of her knowledge of Joseph Trotter's insolvency; this point does not seem to have attracted the attention of counsel. But as to her there is another difficulty; she obtained no preference by the judgment; that, she already had by her mortgage. She may have obtained such preference as to the property not included in the mortgage, the work-horses, farming utensils, etc., but that is not a subject of controversy; that property is not within our jurisdiction; we are called on to exert jurisdiction over the mortgaged property, as to which, if we disregard the judgment, Mrs. Mayers's mortgage is a prior lien. We are then thrown back to draw our conclusion as to the actual fraud from the facts. The case is certainly not free from doubt. It presents an uncomely exterior, beneath which there is probably much hidden deformity, but it will not do to rest our judgment too far upon presumptions. Fraud, like all other facts, must be established by proof. Like other facts, it may be shown by direct or circumstantial or presumptive proof, but the proof ought to be satisfactory. We do not feel authorized, therefore, to say there was fraud in fact; and this brings us to the next inquiry.

2. Was there a fraud in law? On this point, it will be only necessary to notice a single feature of the case—the position which Silas F. Trotter occupied with regard to the debtor and creditor, and the property pledged. First, he was attorney in

fact for the debtor, who lived in Tennessee. His authority or power of attorney was very comprehensive, and he levied on and mortgaged the plantation in Louisiana. In the next place, he was attorney in fact for the creditor, Mrs. Mayers, acting under an authority which invested him with full power to do anything and everything in securing or in collecting her debt, and he also wished to become purchaser, and actually did so. He was acting in a threefold capacity—for the debtor, for the creditor, and for himself. For the debtor, he was bound to make the property, if it should be sold, bring as much as possible, and he was under the same obligation towards the creditor, but for himself he was interested in getting it as low as possible. The law decides which interest preponderates, and on that account imposes its check, and declares purchases made by a person so situated fraudulent in law. It will not permit any one to make a profit, or have the opportunity of doing so, in consequence of the confidence reposed in him. One of the chief heads of constructive frauds includes those cases which arise from some peculiar confidential relation, existing between the parties, or out of some fiduciary capacity; and the principle upon which courts of equity act in such cases is one of public policy. It is the surest means of protecting the unwary, and of guarding against the preponderating influence of self-interest in those who may happen to be in a situation which would give them advantages. Judge Story enumerates the several relations to which this doctrine applies, including parent and child, guardian and ward, client and attorney, principal and agent, trustee and *cestui que trust*, etc., and concludes by laying down the doctrine thus: "On the whole, the doctrine may be generally stated that, wherever confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage:" 1 Story's Eq. Jur., sec. 349.

Jeremy, in speaking of this rule in its application to trustees, says: "But it being considered that no court of justice is equal to the full investigation of the truth, or capable of avoiding deception in all cases of this kind, this court will not affect to sift into the motives of the parties in every such instance, or to ascertain whether the transaction is morally right; but seeing that if a trustee were permitted to purchase in an honest case, he might do so in one having that appearance, but which, were it not for the infirmity of human testimony, or falsehood, would appear to be grossly otherwise, it has thought fit to lay down a

general rule on the subject." He says this rule applies to attorneys, executors and administrators, agents, commissioners in bankruptcy, and in all cases where confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests which he is in conscience bound to support: *Jeremy's Equity*, 395. It was applied by Chancellor Kent to the case of a trustee, in *Green v. Winter*, 1 Johns. Ch. 26 [7 Am. Dec. 475], and to the case of an agent, in *Parkist v. Alexander*, Id. 394. It was not necessary in such cases to prove that the purchaser made a profit, or that loss resulted to the other parties; the law acts on a general principle of public policy. In the application of this rule, it is proper that we should not state it too broadly as to all cases. It would seem that it has sometimes been regarded as a rule of prohibition, and in other instances only as a rule of presumption, or *prima facie* evidence of fraud. Thus, in reference to a trustee, *Jeremy* says: "It in a manner places him at the mercy of his *cestui que trust*, unless he can prove to the satisfaction of the court, after a zealous and scrupulous investigation of the circumstances, that there was no fraud, no concealment, and no advantage taken by him."

Now suppose he should prove all this, difficult as it may be, is the purchase then to be upheld as valid? Such would seem to be the result of the author's remark, and if so, this is only a rule of presumption, even in regard to trustees, and not one of prohibition, and this gives a flat contradiction to the notion that a trustee cannot purchase at his own sale. We apprehend, however, that, as to a trustee, it is a rule of exclusion. Judge Story takes a distinction between an attorney and a trustee, and holds that the attorney takes the *onus* of proving the entire fairness of the transaction, and then it will be upheld, but a *cestui que trust* may set aside the transaction at his option. He seems to regard agents as being in a condition similar to attorneys. But certainly the reason and policy of the rule would seem to dictate that it should be applied in its most rigorous form to agents, and especially to agents at a distance. They usually have more power than a trustee.

This doctrine, in its application to purchases by assignees under a commission of bankruptcy, was very much considered by Lord Eldon, in several cases. In *Ex parte James*, 8 Ves. 337, he says: "This doctrine as to purchases by trustees, assignees, and persons having a confidential character, stands much more upon general principles than upon any individual

case. It rests upon this: that the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance, as no court is equal to the examination and ascertainment of the truth in much the greater number of cases."

In a similar case, the same distinguished lord chancellor extended the doctrine still further. A person, desiring to purchase part of a bankrupt's estate, desired one who was his attorney and also his banker, to bid for him, as he could not be present; the attorney replied that he was solicitor for the commissioners, and could not therefore do so; thereupon he was requested to engage some other person to bid; at the sale, he spoke to one of the commissioners to bid, who did so for the person who wished to buy the estate, and it was struck off to him. The bankrupt applied to have this sale set aside, and it was decided that neither a commissioner nor the solicitor could bid for themselves or for anybody else, and the sale was set aside, although it was admitted to be fair: *Ex parte Bennett*, 10 Ves. 381. *Ex parte Lacey*, 6 Id. 625, was one of a similar character. From a review of these cases, and from the case of *Owen v. Foulkes*, cited in a note to *Ex parte Lacey*, it seems to have been the opinion of Lord Eldon that in all cases of confidential relation, the rule is one of prohibition; that a trustee, or other confidential agent, cannot buy. But this is not very material, in the present instance. Even if the purchase by Silas F. Trotter is but *prima facie* fraudulent, and might be upheld by proof of its entire fairness after a "zealous and scrupulous examination," we do not think it has been brought within such rule. We have already said there was ground for doubt, and room for suspicion.

The next question is, Can one who occupies the place of a mere creditor set aside this purchase? On this point, we cannot doubt. If the sale was void as to the debtor and the creditor, it was so as to complainant, a mortgagee of the property. She had a direct interest in the subject of the purchase. Nor does it make any difference that this sale was made under execution: *Trimble v. Turner*, 13 Smed. & M. 348 [*ante*, p. 90]. The sales of commissioners in bankruptcy are public, and made in obedience to law; and to such cases, we have seen, the doctrine applies.

It is scarcely necessary to say anything as to the proceeding by monition, as it does not cure defects in sales which are vicious by the acts of the parties.

It only remains to settle the principles of the decree. Ordi-

narily, in cases at law, the party must lose all advantages gained by fraud, as well as the money that may have been paid by him: *Stovall v. Farmers' and Merchants' Bank of Memphis*, 8 Smed. & M. 305 [47 Am. Dec. 85]. But this rule does not apply in equity, where the party seeking to set aside a purchase has been benefited by the discharge of incumbrances, or the payment of debts: *Walker v. Brungard*, 13 Id. 723; *Grant v. Lloyd*, 12 Id. 191. An actual and a constructive fraud may well stand upon different grounds in this respect. When a sale is set aside on the ground of constructive fraud, the purchaser must be put in the same situation he was before the purchase: *Ex parte James*, 8 Ves. 351. This is precisely in accordance with the civil law, article 1978, civil code, which also holds that, even in cases of actual fraud, the party shall be restored for so much as he may prove injured to the benefit of the creditor: Art. 1797.

On this principle, it is an easy matter to adjust the rights of the parties. The purchase was invalid as to the property. The property was valued, and Trotter purchased at two thirds of the value. If he has discharged the prior mortgage to that extent, to wit, the amount paid by him on the particular property which may be in this state, he is entitled to be reimbursed. He must pay hire for the negroes, and will be allowed interest not to exceed the amount of the hire. The complainant will be entitled to the balance, produced by a sale of the property, and an account must be taken.

Judgment reversed, and cause remanded.

Mr. Anderson filed a petition for a reargument, on the ground that it nowhere appeared in proof in the case what was the law of Louisiana on the point upon which the case turned. That the sale took place in that state, and if fraudulent in law, and not in fact, as had been determined, it must have been so by laws of that state—a circumstance which could only be shown by proof, of which he insisted there was none in the record; but the question had been adjudged upon a principle of equity, prevailing in this state and in England, and having no application, so far as appeared, in Louisiana.

The petition was refused.

EFFECTS OF JUDGMENTS OF SISTER STATES.—A judgment entered in another state is entitled to full faith and credit here; but in no case is it to be given any greater effect here than it has at home: *Scott v. Coleman*, 15 Am. Dec. 71. A judgment of a court of record of a sister state is not, technically, a foreign judgment, but is entitled to the same faith and credit as in the state where it was rendered: *Gulick v. Loder*, 23 Id. 711. The judgment

of a sister state, properly authenticated, stands upon the same footing as a domestic judgment; and if conclusive in that state, is equally conclusive in this state (Pennsylvania); and if re-examinable there, is re-examinable here: *Wernsag v. Pawling*, 25 Id. 317. The burden of impeaching a judgment rendered in a sister state is on him who seeks to resist it: *Scott v. Coleman*, 15 Id. 71; see also *Bimeler v. Dawson*, 39 Id. 430; *Welch v. Sykes*, 44 Id. 689, and cases cited in note.

EVIDENCE OF FRAUD—PRESUMPTIONS.—Fraud in conveyances may be presumed from the circumstances and condition of the parties contracting: *King v. Moore*, 42 Mo. 551; *Gallatin v. Cunningham*, 8 Cow. 361; *Booth v. Bunce*, 33 N. Y. 139; *Briscoe v. Bronaugh*, 1 Tex. 326; *Burch v. Smith*, 15 Id. 219; *Mosely v. Buck*, 5 Am. Dec. 508; *Hundley v. Webb*, 20 Id. 189.

RIGHT OF AGENTS, TRUSTEES, EXECUTORS, ADMINISTRATORS, GUARDIAN, AND ATTORNEYS TO PURCHASE FOR THEIR OWN BENEFIT.—It is a rule of public policy, necessary to the proper administration of trust estates, that the trustee cannot, under any circumstances, become the purchaser of or acquire any interest in the trust estate adverse to the beneficiary: *Joor v. Williams*, 33 Miss. 546; *Dorsey v. Dorsey*, 6 Am. Dec. 506; *Owings's Case*, 17 Id. 311; *Armstrong v. Campbell*, 24 Id. 556; *Hunt v. Bass*, Id. 274; *Richardson v. Jones*, 22 Id. 293; *Singstack v. Harding*, 7 Id. 669; *Keaton v. Cobb*, 18 Id. 595; *Davis v. Simpson*, 9 Id. 500; *Brackenridge v. Holland*, 20 Id. 123; *Saltmarsh v. Beane*, 30 Id. 525; *Robertson v. Western Marine and Fire Insurance Co.*, 36 Id. 673; *Field v. Arrowsmith et al.*, 39 Id. 185; *Buckles v. Lafferry's Legatee*, 40 Id. 752; *Scott et al. v. Freeland*, 45 Id. 310; *Batson et al. v. Murrell*, 51 Id. 707, and notes appearing to the cases above mentioned, as published in this series. In *McDonald v. Fithian*, 6 Ill. 269, the court held that an agent was estopped from dealing for his own advantage with his principals, and that he was also precluded from acting as the seller or buyer to or of them on account of the confidential relation to them, he being bound to disclose to them every fact, circumstance, and advantage in relation to the purchase or sale which might come within his knowledge. On this point, see also the cases of *Mackie v. York*, 13 La. Ann. 18; *Bruce v. Davenport*, 36 Barb. 349; *McKinley v. Irvine*, 13 Ala. 681; *Walker v. Palmer*, 24 Id. 358; *Banks v. Judah*, 8 Conn. 145; *Mathews v. Light*, 32 Me. 305; *Moore v. Mandlebaum*, 8 Mich. 423; *Cumberland & Co. v. Sherman*, 30 Barb. 553.

RAWLINGS v. POINDEXTER.

[14 SNEDES AND MARSHALL, 66.]

PAYMENT OF PART OF BILL BY FIRST INDORSER discharges the second indorser to that extent.

PART PAYMENT OF BILL BY SECOND INDORSER will prevent him from suing for the whole amount.

PART PAYMENT OF BILL BY SECOND INDORSER will entitle him to recover the amount which he paid.

ASSUMPSIT. The facts are stated in the opinion.

Evans and Topp, for the plaintiff.

A. W. Dabney, and Guion and Baine, for the defendants.

By Court, CLAYTON, J. This was an action of *assumpsit*, containing three counts; two upon a bill of exchange, and one for money paid to the use of the intestate.

In April, 1837, Mason drew a bill of exchange on Martin, Pleasants, & Co., at twelve months, for upwards of four thousand dollars, payable to W. D. Lanier, and indorsed by Lanier to Rawlings. The bill was protested, both for non-acceptance and non-payment, and it was in proof that Mason had no funds in the hands of the drawees at the time when the bill fell due. Notices of the protest were sent to Huntsville, Alabama, at which place the bill was dated.

It was in proof that Lanier had paid near two thousand dollars on the bill, and that Rawlings had been sued upon his indorsement for the residue, and had paid it after judgment against him.

Mason died in 1839, and his widow qualified as executrix of his estate in August, 1839. Notice of this claim was given to her in March, 1840. A few months thereafter, Mrs. Mason moved into Alabama, and the present defendants qualified as administrators *de bonis non* in 1845. This suit was brought in 1846.

The case comes up on exceptions to the charges given and refused respectively by the court.

The first charge, "that if any part of the bill was paid by the first indorser, the second indorser was discharged from liability to that extent," was correct, and requires no comment.

The second charge was, "that if part of the bill had been paid by the second indorser, he could not sue on the whole bill, and recover against the defendant for the whole amount."

Under the circumstances, this charge, so far as it goes, is likewise unobjectionable; but the jury should also have been told that if the liability of the drawer had been fixed by proper evidence, then that the second indorser was entitled to recover as much as he had paid, by reason of his indorsement, though less than the whole amount. This was in effect asked on the part of the plaintiff, and refused. That refusal was error.

An action for money had and received will lie by the indorser of a note against the maker, after he has paid it: *Cole v. Cushing*, 8 Pick. 50. Such action is in the nature of a bill in equity, and equal and exact justice between the parties should be done in it: *Wright v. Butler*, 6 Wend. 290 [21 Am. Dec. 828]. Lanier might thus have recovered, in this form of action, what he had paid as first indorser. Consequently, the

present plaintiff should only recover what he paid, leaving Lanier to enforce his own rights. This is the justice of the whole transaction.

The judgment must be reversed for this error, and a new trial awarded.

Judgment reversed, and cause remanded for new trial.

ACTIONS FOR MONEY PAID WILL LIE AGAINST INDORSER when a subsequent indorser has made a partial payment on the note: *Wright v. Butler*, 21 Am. Dec. 323, and note 327. In the case of *Eagle Bank v. Smith*, 13 Id. 37, the court held that an indorsee may sue the maker or indorser of a note for money had and received, or for money lent. In *Ainslie v. Wilson*, 17 Id. 532, it was held that the first indorser, having paid a second indorser a part of the debt and procured his release from liability, is not prohibited from maintaining an action against the maker by the fact that the note was subsequently sold and indorsed to another, who executed a release to the maker. The legal effect of several subsequent indorsements is that each indorser has a right to look for indemnity to all the indorsers who precede him: *Bank of United States v. Beirne*, 42 Id. 551.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

O'BRYAN v. O'BRYAN.

[18 MISSOURI, 12.]

EVIDENCE OF GENERAL GOOD CHARACTER IS ADMISSIBLE IN ACTION FOR DIVORCE where the charge is adultery.

ACTION FOR DIVORCE IS IN NATURE OF CRIMINAL PROCEEDING.

WHERE ISSUES OF FACT HAVE BEEN MADE UP IN CHANCERY CASE, and tried by a jury under the eye of the chancellor, and a motion for a new trial has been by him overruled, the appellate court will regard the finding of the jury as in the nature of a verdict at common law, and will not disturb it.

BILL for divorce upon the ground of adultery. Defendant denied the charges in her answer, and at her request issues of fact were made up by the court and tried by a jury. After the case was closed on the part of the plaintiff, defendant, among other defenses, introduced evidence of her general character as a woman of chastity and virtue. Plaintiff objected to this evidence, but the court overruled his objection and allowed it. All the issues were found for defendant by the jury, and the plaintiff moved to set aside the verdict and for a new trial, because the finding was against the evidence, and because of the admission of improper testimony. This motion was denied, and the complainant's bill dismissed, which ruling is now assigned as error.

Leonard and Hayden, for the plaintiff.

Adams, Stuart, and Miller, for the defendant.

By Court, RYLAND, J. From the above statement, two points present themselves for the adjudication of this court: the first is the admission of the evidence of the defendant's

good character; and the second, the refusal of the court to grant a new trial. If either of these points be ruled for the complainant, this case will have to be remanded.

It is a general rule that evidence of a general character is not admissible in civil suits; but to this general rule there are many exceptions. Greenleaf, in his treatise on evidence, volume 1, section 54, says: "In civil cases, such evidence is not admitted, unless the nature of the action involves the general character of the party, or goes directly to affect it." "And generally in actions of tort, whenever the defendant is charged with fraud, from mere circumstances, evidence of his general good character is admissible to repel it—so also in criminal prosecutions, the charge of a rape, or an assault with intent to commit a rape, is considered as involving, not only the general character of the prosecutrix for chastity, but the particular fact of her previous criminal connection with the prisoner." "And in all cases where evidence is admitted touching the general character of the party, it ought manifestly to have reference to the nature of the charge against him."

There is no doubt that, in criminal prosecutions, the general good character of the defendant is legitimate evidence. Formerly, this kind of evidence was allowed to defendants in capital cases only; but this rule has been so much relaxed in modern practice as to admit such evidence generally in all criminal prosecutions.

The rules of evidence have their foundation in plain common sense. They were adopted as the means of eliciting the truth, of unfolding and bringing to light the facts connected and involved in the various transactions of life which might become the subjects of judicial investigation, as well as to afford facilities to the legal inquirer, in his often obscure and difficult searches to find the motive and the will which prompt and produce such transactions. In the nature of things, it is impossible to establish and fix any number of uniform and general rules which might not bear oppressively severe on some individual cases. Hence, the great number of exceptions to be found to these general rules. I know of no situation in which, in a civil suit, a defendant can be placed, where general good character can be of more importance to her than in a proceeding for a divorce upon the ground of infidelity to her husband.

The charge of adultery involves directly the character of the defendant. It partakes deeply of the nature of a criminal proceeding. It is highly penal in its effects. Convict the defend-

ant of the charge, and the law deprives her of her property, of her children, of all that is dear to her, and turns her as an outcast upon the world, a miserable and degraded being. The only defense to such a charge, especially if it be false, may be her good, her spotless character; deprive her of the right to offer that before the jury, and the consequence will be that to charge and to convict will be almost convertible terms. In the case of *Gregory v. Thomas*, 2 Bibb, 286 [5 Am. Dec. 608], which was an action for a malicious prosecution, the defendant justified by pleading what causes and grounds he had to prosecute the plaintiff; and on the trial the circuit court permitted the defendant to prove any particular charge or imputation of theft of any kind, which had been committed by the plaintiff at any period of his life, though unconnected in circumstances with any matter of fact specially alleged in the pleadings. The court of appeals reversed the judgment, stating that the court below ought not to have permitted the inquiry to have extended further than the plaintiff's general character. In the case of *Humphrey v. Humphrey*, 7 Conn. 116, which was a petition for a divorce, the cause assigned was the defendant's adultery; the court below admitted the defendant to give evidence of her general good character; but the supreme court reversed the judgment of the court below for this reason, Judge Peters dissenting. This decision of *Humphrey v. Humphrey* was afterwards cited by the supreme court of Alabama: See *Ward & Thompson v. Herndon*, 5 Port. 382. In this last case, the court uses the language of Chief Justice Tilghman, in the case of *Anderson's Ex'rs v. Long*, 10 Serg. & R. 61, as follows: "But putting character in issue is a technical expression, and confined to certain actions, from the notice of which the character of the parties, or some of them, is of particular importance." "But it never has been supposed that character is put in issue merely by the charge of fraud, made by one party against another." In the above quotation from Chief Justice Tilghman, I have no doubt the word "notice" is put by mistake for "nature."

In actions of criminal conversation, slander, malicious prosecution, the general character is given in evidence, in order to enable the jury to place a proper estimate thereon, in damages in dollars and cents. In cases like the one now before the court, although the jury do not assess damages, yet, by their verdict, they can affect the character of the defendant, in a most important matter. Their verdict does not estimate, does not value the character; but it may strip it of all that is dear.

and leave it a blighted, withered object, for "bitter scorn and lasting infamy." This doctrine is tinctured with that absurdity which teaches us to take care of the shadow, however we neglect the substance. Viewing this proceeding, therefore, as a pure, unmixed civil one, I am satisfied that every consideration, every inducement, which has heretofore permitted evidence of general character, to be given in cases of criminal conversation, slander, malicious prosecution, should permit the same evidence in a petition or bill for a divorce, where the charge is adultery. But I am warranted by authority in considering this case as partaking of the nature of a criminal proceeding. The supreme court of Pennsylvania, in the case of *Garrat v. Garrat*, 4 Yeates, 244, which was a libel for a divorce, treats the proceeding as a criminal one; and Chief Justice Gibbon, in the case of *Matchin v. Matchin*, 6 Pa. St. 336 [47 Am. Dec. 466], says: "A libel for a divorce is said to partake of the nature of a criminal proceeding." I am free to declare, therefore, upon a full consideration of the cases and authorities cited, that evidence of general good character, in a proceeding by petition, or bill in chancery, charging the defendant with the crime of adultery, should be admitted by the courts of this state. Such evidence comes fully and completely within the exception above cited from Greenleaf. By permitting the defendant to give proof of general good character for chastity, the complainant cannot be injured. He has the privilege of rebutting by the same kind of evidence; but deprive the defendant of this privilege, and irreparable injury may follow. Let us look at the consequences which may result from the doctrine contended for by the complainant's counsel. A virtuous woman may be falsely charged, and the same villainy which could fabricate the charge could accompany it with such "mode and circumstance" as to leave the defendant no power, from extraneous circumstances, to disprove it. She must rely upon her good name; her only hope of safety is in that homage which the wise and good invariably and involuntarily pay to virtue under suffering and misfortune. I am unwilling to aid or assist in depriving her of this humble privilege, which is allowed to the defendant in a criminal prosecution for petit larceny. I find no error, therefore, on this point.

I will now consider the second point, the overruling the motion for a new trial.

By the statute concerning "Practice at Law," art. 7, sec. 3, only one new trial shall be allowed to either party, except, first, "where the triers of the fact shall have erred in a matter

of law;" secondly, "where the jury shall be guilty of misbehavior."

By the statute concerning "Practice in Chancery," art. 3, sec. 9, "the court may award a new trial of any issue upon good cause shown, but not more than one new trial of the same issue shall be granted to any one party." From the great resemblance these statutes bear to each other on the subject of new trials of issues, I am inclined to think that the practice of this court should be the same as regards them. In appeals from the decisions of the circuit courts in chancery cases, this court examines all the evidence, looks into the facts of the case, and makes such an order and decree as we think the court below should have made. But in the cases where issues of fact have been made up, under the direction of the chancellor, and tried between the parties, we look upon the finding of the jury, upon such issues, as verdicts at common law; and when the chancellor, before whom these issues have been tried, upon motion refuses to have them tried anew, by setting aside the first finding, I must see a clear and obvious case of improper finding by the triers, or of misdirection by the court, before I will interfere. In this case now before the court, I am unable to see any good reason why this court should depart from its former course of practice and decision in regard to new trials after verdict of the jury at common law. Here were issues of fact made up and tried before a jury, under the eye of the chancellor. A motion was made to grant a new trial, the chancellor overruled it, thereby declaring his satisfaction with the finding of the jury; at the same time negating the idea that there was, in his estimation, good cause for his interference with such finding. This court is not called on to say whether it would have found the same verdict or not—whether it is satisfied with the verdict or not. The jury was the proper tribunal to try the issues. Before the jury the witnesses were produced face to face. In all probability, the jury knew all the witnesses, and could see the manner of each witness in relating his testimony; could put faith and credit to such witnesses as the jury supposed deserved them, and pass over such as in their opinion were not entitled to credence. There was testimony on both sides of these issues; and the jury having found their verdict, I am unwilling to disturb it.

The decree of the court below is therefore affirmed.

BIRCH, J., concurred.

EVIDENCE OF CHARACTER IN CIVIL ACTIONS.—As a general rule, evidence of good general character is inadmissible by way of defense in civil actions in which a party is charged with a specific fraud, because the character of every transaction must be ascertained from its own circumstances, and not from the character of the parties: *Fowler v. Aetna Ins. Co.*, 16 Am. Dec. 460. Such evidence is not admitted in civil actions, unless the nature of the action involves the general character of the party, or goes directly to affect it: 1 Greenl. Ev., sec. 54; 1 Phill. Ev., 10th ed., 757; *Church v. Drummond*, 7 Ind. 17; *Gutwiler v. Lackman*, 23 Mo. 168; *Porter v. Sellar*, 23 Pa. St. 424; *Ward v. Herndon*, 5 Port. 382; *Boardman v. Woodman*, 47 N. H. 120; *Atkinson v. Graham*, 5 Watts, 411; *Humphrey v. Humphrey*, 7 Conn. 116. "The transaction presented in an ordinary civil case must depend upon its circumstances, and not upon the character of the parties. In such a case, no matter how serious a moral delinquency may be involved in a fact, and how much the establishment of that fact may affect a party's reputation, he cannot invoke the aid of his previous reputation to disprove the fact:" *Smets v. Plunkett*, 1 Strobh. 372. So where the defendant was accused of burning wheat belonging to plaintiff, evidence of character was held inadmissible: *Barton v. Thompson*, 56 Iowa, 571; but a witness may be cross-examined as to the character of one of the parties to show his belief in his sincerity: *Howard v. Patrick*, 43 Mich. 121. "In civil cases, where the question of character is directly in issue, and material as to the amount of damages, as in seduction or slander, evidence of character is admitted:" *Wright v. McKee*, 37 Vt. 161. Plaintiff in an action of trespass for assault and battery was not allowed to give in evidence his general good character, the court giving as a reason that it was a well-settled rule of evidence that the testimony should be applied to the particular fact in dispute, and that in civil actions, the character of neither party should be called in question, in *Givens v. Bradley*, 6 Am. Dec. 646, and in *Revill v. Pettit*, 3 Metc. (Ky.) 314.

In *Ruan v. Perry*, 3 Cal. 120, which is a leading authority upon this question, and cited in nearly every case where it arises, it was held that if the defendant was charged with fraud from mere circumstances, evidence of general character is admissible: See also *State of Minnesota v. Beebe*, 17 Minn. 241; *Fowler v. Aetna Ins. Co.*, 16 Am. Dec. 460; *Walker v. Stephenson*, 3 Esp. 284; but, in general, where a party is charged with a specific fraud in a civil action, his character not being in issue, the evidence of fraud cannot be repelled by proving his general good character for integrity: *Fowler v. Aetna Ins. Co.*, 16 Am. Dec. 460. The character of dead subscribing witnesses to a will may be inquired into for the purpose of showing that they would not be likely to sign an improper will: *Doe ex dem. Walker v. Stephenson*, 3 Esp. 483. In *Morris v. Haweswood*, 1 Bush, 208, plaintiff sued defendant for money which he alleged defendant had converted to his own use, but which defendant alleged had been stolen from him, and defendant was not allowed to prove his general good character to rebut the presumption of such fraudulent conversion. So, in an action for malicious mischief, evidence of good character of defendant, or that plaintiff's witnesses were habitual drunkards, was held inadmissible: *Thayer v. Boyle*, 30 Me. 475; and in a proceeding to impeach the probate of a will, as procured by fraud or collusion, evidence of the character of the parties accused of the fraud is not admissible: *Potter v. Webb*, 6 Greenl. 6. So the plea of fraud in debt, as it does not put the character in issue, cannot be supported by proving character: *Anderson's Ex'rs v. Long et al.*, 10 Serg. & R. 55. A party's character not being impeached, he cannot give evidence to support it: *Pratt v. Anderson*, 4 N. Y. 493; *Ketland v. Bissett*, 1 Wash. 144.

EVIDENCE OF CHARACTER ADMISSIBLE IN CRIMINAL CASES.—In trials for felony and high treason, and in trials also for misdemeanors, where the direct object of the prosecution is to punish the offense, the prisoner is always permitted to call witnesses to his general character: 1 Phill. Ev., 10th ed., 762; 1 Best on Ev., sec. 259; *Commonwealth v. Hardy*, 2 Mass. 317; *Wright v. McKee*, 37 Vt. 161. In cases where the evidence is doubtful, proof of character is very important, and may be weighed by the jury in connection with other circumstances: *People v. Cole*, 4 Park. Cr. Cas. 35; *Bennett v. State*, 27 Tenn. 118; *Eppe v. State*, 19 Ga. 102; *Williams v. State*, 52 Ala. 411; *Felix v. State*, 18 Id. 720; *State v. Ford*, 3 Strobb. 517; *State v. Wells*, 1 Cox, 424; *Rosenbaum v. State*, 33 Ala. 354; *Stover v. People*, 56 N. Y. 315.

But evidence of character to be admitted must be confined to the trait in issue: 1 Greenl. Ev., sec. 55; *People v. Josephus*, 7 Cal. 129; *State v. O'Connor*, 31 Mo. 389; and consequently the defendant was not allowed to show that he was an industrious citizen, where he was charged with an assault to kill: *State v. Dalton*, 27 Id. 13. When this evidence is introduced, his whole character with regard to this trait must be in evidence, and the defendant cannot show particular instances of his good conduct, nor can the state show particular instances of his bad conduct: *Engleman v. State*, 2 Ind. 91; *People v. Milgate*, 5 Cal. 127; *Carter v. Commonwealth*, 2 Va. Cas. 169.

But it is a well-established rule of evidence that the prosecution in criminal cases cannot introduce evidence of the bad character of the accused, until he himself has put it in issue by introducing evidence of his general good character: *People v. Bodine*, 1 Edm. Sel. Cas. 36; *State v. Carter*, 1 Houst. Crim. Cas. 402; *People v. White*, 14 Wend. 111; and in *State v. Creson*, 38 Mo. 372, where the court said that the admission of such testimony was contrary to established principles of law, and that the prosecution could only introduce it to rebut evidence of his good character, already introduced by him. Such evidence is not confined to the character of the defendant prior to the time of the commission of the alleged offense. Evidence of a bad reputation, subsequently acquired, may, indeed, be of little weight; but still it will have some bearing, as commonly the descent from virtue to crime is gradual: *Commonwealth v. Sacket*, 22 Pick. 394. After evidence of character has been introduced by the defendant, it is a fact in the case, and he is entitled to an instruction stating that it is a circumstance tending, in a greater or less degree, to establish his innocence, and the jury must take such evidence into consideration, for the purpose of determining whether it creates a reasonable doubt of his guilt: *People v. Doggett*, 62 Cal. 27; *People v. Ashe*, 44 Id. 288; *People v. Raina*, 45 Id. 292; *People v. Bell*, 49 Id. 485.

HURST v. ROBINSON.

[18 MISSOURI, 82.]

ADMISSION BY ONE OF TWO OR MORE CO-PLAINTIFFS OR CO-DEFENDANTS, if they have a joint interest in the suit, is in general evidence against all. **IF PROPER INSTRUCTION HAS BEEN GIVEN,** a decision of the lower court will not be reversed for refusing to give others, the opposite of the one given.

HURST & SALMON, copartners, sued defendant in error for a blacksmith bill amounting to some thirty dollars. After several

trials, defendant in error recovered judgment in the October term of the circuit court in 1849, the court sitting as a jury. While the case was before the court, a deposition of plaintiff Hurst, which was suppressed by the court, was read in evidence by the defendant in error, as an admission of said plaintiff. The partnership had long been dissolved at this time. Numerous instructions were asked by both sides and refused by the court. Plaintiff assigns as error the admission of Hurst's declarations as contained in his said suppressed deposition, the giving of defendant's second instruction, the refusal of the first seven instructions asked by plaintiff in error, and the refusal to grant a new trial.

Kownslar, for the plaintiff in error.

Hayden, for the defendant in error.

By Court, RYLAND, J. The questions which appear to this court of most importance are those arising from the instructions given, and the admission of the statement of the plaintiff Hurst, that the account against the defendant Robinson had been fully settled. We shall pay no attention to the question, which the plaintiff in error endeavored to raise in the court below, about the custom of paying for blacksmith work in this country in money only; nor shall we trouble ourselves to notice the power, authority, or right of one partner in the blacksmith business to make agreements with the farmers for their custom, by contracting to take what is called in this case "farm produce," for such blacksmith work as shall be done for them, in the shop of which he is partner. The question as to the admission of the statement of the plaintiff Hurst, which he had made in writing, under oath, in the form of a deposition, is the most important one in this case. It seems that the defendant Robinson had taken the deposition of the plaintiff Hurst, one of the partners in the blacksmith business; which deposition had been suppressed by the court below. The defendant Robinson then proposed to read this statement, not as a deposition, but as a confession or admission of facts by one of the plaintiffs in this case. He proved the handwriting of Hurst, and offered to read his statement. This was objected to by the plaintiffs, but admitted by the court.

The principle involved in this question has heretofore demanded the attention and received the consideration of this court. In the case of *Armstrong et al. v. Farrar*, 8 Mo. 627,

this question came up, and after a review of many decisions, the court express their unwillingness to depart from the rule laid down in Phillips, Starkie, and Greenleaf. It is thus stated by Greenleaf: "If the parties have a joint interest in the matter in suit, whether as plaintiffs or defendants, an admission made by one is in general evidence against all; they stand in this respect to each other, in relation, similar to that of existing copartners." We still adhere to the views of this court given in that case, and consequently we see no error in the admission of this evidence in the court below.

The plaintiffs have no right to object to it, because the deposition had been suppressed. It was not read as a deposition, but simply an admission in writing by one of the plaintiffs.

We have no fault to make with the action of the court in giving the second instruction prayed for by the defendant Robinson; and consequently we are not disposed to find fault in the act of the court below, in refusing to give the first seven instructions prayed for by the plaintiffs, as these seven refused are but the converse, in some shape, to the one given for defendant. We will here insert the second instruction, the only one given for the defendant Robinson: "That it was competent for the partner, Hurst, during the partnership, to make a special agreement with Robinson to do the blacksmith work, etc., mentioned in the accounts sued on, for Robinson, and to receive pay therefor in property other than money, and that if the court find from the evidence that the partner, Hurst, during the partnership did, as the partner in the said blacksmith business, do and perform the work, etc., for the said Robinson, for which suit is brought; and further find that the same was done, etc., under said agreement, and paid for by Robinson according to said agreement, before the commencement of this suit, that then the plaintiffs cannot recover."

Here, we find the whole merits of the case turn. The plaintiffs, having been paid once, agreeably to the understanding when the work was brought to the shop to be performed, although this payment was made to one of them, and the work done by that one, are still seeking to recover payment again; and alleging as a reason for this conduct that the payment of the account was in "farm produce," for the use of one of the plaintiffs, one of the firm. We are not anxious to seek out objections, technical defects, in order to reverse a judgment so consonant with right and justice as this one is.

The judgment of the court below will therefore be affirmed.

WHERE PROPER INSTRUCTIONS COVERING WHOLE GROUND of the controversy are given by the court, the judgment will not be reversed merely because some instructions asked for and rejected might have been granted: See *Mutual Safety Insurance Co. v. Cohen*, 43 Am. Dec. 341, and note.

WILKERSON v. STATE.

[13 MISSOURI, 91.]

TWO NAMES WHICH IN ORIGINAL DERIVATION ARE SAME, and are taken promiscuously in common use, though they do differ in sound, are substantially the same, and the use of one instead of the other will not support a plea in abatement.

THE question as to whether or not the circuit court did right in refusing to admit the defendant's plea in abatement to be filed, and in not allowing an issue to be made upon that plea, is the only one presented in this case.

Robards, attorney-general, for the state.

By Court, RYLAND, J. This case presents no other question before us than the act of the court below, in treating the defendant's plea in abatement as a nullity.

We are satisfied that the plea is not a good one, and that the matter set forth in the plea is not susceptible of being properly pleaded in abatement; and we are not disposed to complain of the court below in thus treating it.

The authority in 2 Hawkins's Pleas of the Crown, cited by the attorney-general, sustains his position; but without saying anything to sanction that authority, we are satisfied that this plea has no merits. "Wilkerson" or "Wilkinson," like the names of "Robinson" or "Robertson" or "Roberson," "Hudson" or "Hutson," are so much alike in sound, so nearly the same in original derivation, and so promiscuously taken in common use, that the variance in orthography may be considered so nearly nothing as that the law will not notice it. *De minimis non curat lex*.

The authority of the case of *Gordon v. Holiday*, 1 Wash. C. C. 285, will shed much light upon the subject to those among us who yet seem so fond of technicalities that have met with no favor in courts of justice for more than a century.

In this case, the bill of exceptions shows that when the case was called for trial the defendant announced himself ready. A jury was sworn to try the case, and by their verdict found the defendant guilty of the offense of gaming, assessed his punish-

ment to ten dollars, and then the defendant complains that his plea in abatement had not been tried. We are satisfied with the action of the court, in paying no attention to his plea, in treating it as a mere nullity.

He has had the advantage of a jury to try his guilt or innocence. He has no cause to complain.

Let the judgment be affirmed.

All the authorities to the point involved in the above case in this series are collected in the note to *Edmondson v. State*, 52 Am. Dec. 169. The principal case was cited by way of analogy, to sustain the proposition that the name "Hutson" for "Hudson" in an indictment was not fatal, in *State v. Hutson*, 15 Mo. 512.

WILSON v. HUSTON.

[13 MISSOURI, 142.]

INDORSER OF PROMISSORY NOTE, WITH KNOWLEDGE OF FAILURE OF HOLDER TO MAKE DEMAND upon the maker or acceptor, who makes an unconditional promise to pay, or acts in such a way as to show an acknowledgment of his liability, thereby waives his right to notice of demand and refusal to pay.

WHAT FACTS WILL AMOUNT TO WAIVER OF NOTICE of non-payment of note is a question of law for the court.

INSTRUCTION THAT CERTAIN EVIDENCE CONDUCTED TO PROVE CERTAIN FACTS, from which the court might find for the plaintiff, amounts but to a comment upon the testimony, and is an encroachment upon the province of the triers of fact.

INDORSER MAY ACT AS AGENT, OR BE EMPLOYED TO PROSECUTE SUIT for the collection of a note, and not waive his right to notice of its non-payment.

ERROR to the Cole circuit. The facts are stated in the opinion.

Hayden, for the plaintiff in error.

Abell and Stringfellow, for the defendant in error.

By Court, **NAPTON, J.** This was a suit against Huston as indorser of a negotiable note, made payable to him by J. W. & P. L. Smith. The case was submitted to the court without a jury. Upon the trial, the plaintiffs read the deposition of one Smallwood, who stated that some time in December, 1843, the defendant, Huston, placed in his hands for collection the note sued on, for which the witness gave his receipt; that said Huston stated that he had transferred the note to the plaintiffs; that the makers of the note resided in Ray county; that the witness (who was a lawyer) immediately instituted suit against

the makers in the Ray circuit court and obtained a judgment; that this suit was conducted, from the beginning to its termination, under the direction of said Huston; that said Huston and the deponent boarded at the same house in Lexington, and had frequent conversations concerning said suit; that Huston had full knowledge of the manner in which said suit was conducted, and of every step taken in its progress. The deponent was under the impression that Huston communicated to him as a reason why he undertook to have said note collected, that the makers were in a failing condition, and he apprehended a loss if any delay occurred. The deponent further stated that he had no conversation with the Wilsons (plaintiffs), or either of them, touching the note or suit during its progress. The receipt which this witness executed to Huston, when he received the note for collection, is as follows:

“Received from Messrs. S. & W. Wilson, for collection, by the hands of James Huston, a note drawn by James W. & P. L. Smith, for the sum of one hundred and fifty dollars, payable twelve months after date, dated September 18, 1842, bearing interest from date, at ten per cent, drawn payable to James Huston, and by him assigned to S. & W. Wilson.

“December 27, 1843.

L. W. SMALLWOOD.”

This was the only evidence in the case touching the question of notice or waiver of notice on the part of Huston.

The plaintiffs asked thirteen instructions, most of which were refused. The court declared the following to be the law applicable to the case: “The law of this case is, that if the plaintiffs have not given sufficient evidence to show that the note in controversy was indorsed at a different time from that stated in their bill of particulars, it ought to be considered as true that said note was indorsed at the time mentioned in the bill of particulars. If the note in question was indorsed before its maturity, the defendant was entitled to notice of the non-payment thereof by the makers within a reasonable time after such note had been presented and payment refused. If the note in question was indorsed before its maturity, the plaintiffs, in order to relieve themselves from the necessity of giving notice to the defendant of the non-payment thereof, must show a waiver of the right on the part of Huston, either expressed or implied, to demand such notice, or a promise to pay such note after its dishonor, with a knowledge of the facts of its presentment for payment, and dishonor or failure of plaintiffs to present such note for payment.”

The court also gave the fourth, fifth, seventh, and eighth instructions as requested by the plaintiff, which were as follows:

"4. If the court find from the evidence that at the time the note was assigned by the defendant to the plaintiffs, it was the understanding or agreement between them that the defendant was to collect the money therein specified for the plaintiffs, and that the defendant, to that end, caused the suit to be instituted in the Ray circuit court, and prosecuted the same to judgment, execution, etc., as set forth in said record and proceedings of the Ray circuit court, which was read in evidence by the plaintiffs, and failed to collect the same, as therein specified, then the court ought to find for the plaintiffs."

"5. If the court find from the evidence that it was the agreement or understanding between the plaintiffs and defendant, at the time the defendant assigned the note of the said Smiths to them, that he was to collect the money therein specified for said plaintiffs, then it was not necessary that the said plaintiffs should have given to said defendant notice of the non-payment thereof to them, the said plaintiffs, even though the court shall find that the note was assigned before the money therein specified became due."

"7. If the court find from the evidence that the defendant assigned said note to the plaintiffs, as alleged in the declaration; and further find that the plaintiffs, in their bill of particulars of their claim and demand filed in this cause, and for which this suit is brought, have stated or specified therein that the said note was assigned and indorsed by him, said defendant, to said plaintiffs, on or about the twenty-second day of May, 1843, as specified in said bill of particulars; that such statement of the particular time of the said assignment of the note does not require the plaintiffs to prove the assignment was made precisely as so stated, but they may prove that the note was assigned at a time subsequent or prior thereto."

"8. The fact that the written indorsement of the said note to the plaintiffs, as read in evidence to the court, has no date thereto, is no evidence that the note was assigned by defendant to the plaintiffs before the money therein specified became due."

The plaintiffs objected to the instructions given by the court, and took a nonsuit. After an unsuccessful motion to set this nonsuit aside, they appealed.

It is well settled that if an indorser, with a knowledge of the failure of the holder to make a demand upon the maker or acceptor, makes an unconditional promise to pay, or acts in such

a way as to show an acknowledgment of his liability, with a knowledge of the facts which would exempt him, such declarations and acts are an implied waiver of due notice of a demand upon the drawer or acceptor. These declarations and acts amount to an admission of the party making them, that the holder has a right to resort to him on the bill, and that he has received no damage for want of notice: *Rogers v. Stevens*, 2 T. R. 713; *Thornton v. Wynn*, 12 Wheat. 183; *Hopkins v. Liwell*, 12 Mass. 53.

Mr. Bayley remarks, in his treatise on bills, chapter 9, page 406, that under an allegation of notice it may be questionable whether evidence can be given to excuse the want of notice, or whether, to let in such evidence, the facts to excuse notice should not be specially pleaded. If this conjecture be well founded, it establishes the proposition that what facts will excuse notice or amount to a waiver of notice must be a question of law for the determination of the court. And this opinion, with some deviations in practice, seems to be the one generally adopted: *Smith's Lead. Cas.* 242; *U. S. Dig.*, tit. Promissory Notes, c. 16, p. 618.

The instructions given by the court at the instance of the plaintiffs were based upon this understanding of the law, and those given by the court of its own accord, so far as they went, were not inconsistent with this principle. Those instructions have not been objected to, and so far as we can discover are unobjectionable. The only ground upon which the plaintiffs could be justified in taking a nonsuit, with any expectation that this court would set it aside, must be found in the refusal of the court to give certain instructions asked by the plaintiffs. These instructions I have not embodied at length in the statement, because they contain a palpable and fatal defect which can be explained without reference to their phraseology or minute details. The first, second, third, sixth, eleventh, and twelfth instructions called upon the court to declare that certain facts, about which there was testimony, conduced to prove or establish certain other facts, and that from these facts the court might find a verdict for the plaintiffs. Instructions of this character can only amount to comments upon the testimony, and are a plain encroachment upon the province of the triers of fact. They are only calculated to mislead where they are given to juries, and totally unnecessary where the court itself has been called upon to assume the settlement of both the facts and law of the case.

The ninth instruction is as follows: "That if the court find

from evidence that the said defendant procured the said Smallwood to institute and prosecute said suit in the Ray circuit court, upon said note, after said assignment thereof, to judgment, execution, etc., as deposed to by said Smallwood, and as specified in said record and proceedings read in evidence by plaintiffs, then the court ought to find that the said defendant either had due notice of the non-payment of the money in the note specified by the makers thereof, or that the said defendant had waived his right to demand or require such notice of the non-payment thereof from said plaintiffs."

This is manifestly a *non sequitur*. There are circumstances and facts not alluded to in the instruction which would control the liability of Huston upon the hypothesis stated. He may have taken the note as a mere agent for collection, and without considering himself as having any personal interest in the result. He may have taken it after it was due, and after his release had resulted from the failure of the plaintiffs to make a demand upon the Smiths. In either event, he was no longer responsible, and his acting as agent for collection, either *ex gratia* or for reward, would not revive his liability. On the other hand, there are circumstances which might establish his liability. If Huston and the plaintiffs resided in the same town, and the former did not follow the business of collecting, the language attributed to him by the witness Smallwood, when pressing the suit against the Smiths, would go very far to show a knowledge on the part of Huston of the want of demand, and an admission of his continued liability notwithstanding such laches. This would be a fact for the jury. The evidence in the case was meager, and the apprehensions of the plaintiffs, and their unwillingness to let the case go to a verdict, seem to have resulted rather from the meagerness of the evidence than from any failure on the part of the court to declare the legal principles upon which the verdict was to depend. Indeed, it is not by any means apparent that the plaintiffs were bound to lose a verdict. It was for them, however, to risk the case or not, as they preferred.

The tenth instruction was, that upon the facts given in evidence the plaintiffs were entitled to a verdict. This was not so as a proposition of law, although such might have been the result.

These are all the instructions refused, and as we can discover no error in declining to give them, the nonsuit must stand.

Judgment affirmed.

RYLAND, J., dissented.

IF INDORSER OF PROMISSORY NOTE PROMISES TO PAY SAME after failure of due notice, with full knowledge of the laches, he waives the want of notice and is liable: See *Trimble v. Thorne*, 8 Am. Dec. 302, and note; *Ladd v. Kenney*, 9 Id. 77; *Hall v. Freeman*, 10 Id. 621; *Miller v. Hackley*, 4 Id. 372; *Durham v. Price*, 26 Id. 267; *Debays v. Mollere*, 15 Id. 159; *United States Bank v. Southard*, 35 Id. 521, and note; *Hunt v. Wadleigh*, 45 Id. 108.

INSTRUCTIONS TO JURY SHOULD BE POSITIVE AND SPECIFIC, and should leave nothing to inference: *Snyder v. Laframboise*, 12 Am. Dec. 187.

WILLIAMS v. COWDEN.

[18 MISSOURI, 211.]

ESTATE DEVISED TO SON AND DAUGHTER IN COMMON, upon condition that should the daughter marry or die it should belong to the son in severalty: *Held*, that the condition was in restraint of marriage, and void.

ERROR to the Boone circuit court. The opinion states the facts.

Gordon, for the plaintiffs in error.

Robards, for the defendant in error.

By Court, BIRCH, J. The plaintiffs in error brought their suit in the Boone circuit court, against the defendant, for partition of a tract of land. The petition alleged that in the month of August, 1845, Joseph Cowden died seised of the tract in fee, and that prior to his death he made and published his will, whereby, amongst other things, he gave and bequeathed to his son Montgomery, and his daughter Louisa, in equal moieties, the tract of land in suit, with provision, however, that if his said daughter should marry or die, the land should belong to his said son exclusively. It is further alleged in the petition that, at the commencement of this suit, the said Montgomery was living and married, and that, on the twenty-sixth day of January, 1847, the plaintiffs intermarried with each other. The petition concludes with the allegation that the said Montgomery and the said Louisa are each entitled to the equal undivided half of the land, and prays for judgment of partition or sale, accordingly. The circuit court having sustained the defendant's demurrer to the petition, the plaintiff presents the legal questions involved in that decision for the examination and decision of this court.

The question being a new one in the jurisprudence of our state, and the authorities to which we have been referred apparently irreconcilable, we have bestowed upon it such analysis and reflection as has resulted in the conclusion that upon all

just principles of reason and analogy, the legal effect of the will in question, so far as it can be inferred from the pleadings before us, was to vest the real estate therein specified, at the death of the testator, in his two children as tenants in common; and that the condition subsequent, respecting the marriage of his daughter, was not such a one as in law will divest such an estate. Viewing the case thus, neither the distinction which seems to be somewhat relied on, where there is and where there is not a "bequest over," nor the one even less applicable in this country, as between bequests of real and personal estate, need be further examined or remarked upon here, than to state in reference to the former that in the absence of the will itself (there being as yet neither answer nor testimony), we must needs regard the alleged provision as within the general rule, instead of such exception as may or may not be established upon the full hearing for which we shall remand the cause.

Upon the general proposition, the preservation of domestic happiness, the security of private virtue, and the rearing of families in habits of sound morality and filial obedience and reverence, are deemed to be objects too important to society to be weighed in the scale against individual or personal will. In this case, it need scarcely be more specifically intimated that the clause in question, however well intended, virtually presented and held up a continued reward for that species of immorality to avert which the institution of marriage was so divinely ordained and has been so wisely upheld. By its terms, no offense but that of marriage, however suitable, no crime even, could divest his child of the estate bequeathed to her. Surely society has not been organized thus to uphold a direction to property, which is not its creature, and which could not even be acquired or transmitted without its aid and protection, but which it must be obvious might thereby undermine and overthrow the main foundation upon which it reposes. It is admitted that this may be regarded, in one sense, as an isolated case, but to this it must be answered that courts can pass upon it only as parcel of a system in contravention with the one out of which has grown the right to pass upon it at all.

Judge Story, in his admirable commentaries upon equity jurisprudence, after remarking upon the cases which even he cannot reconcile, states the general result of the modern English doctrine in these words: "Conditions annexed to gifts, legacies, and devices in restraint of marriage are not void, if they are reasonable in themselves, and do not directly or vir-

tually operate as an undue restraint upon the freedom of marriage. If the condition is in restraint of marriage generally, then, indeed, as a condition against public policy and the due economy and morality of domestic life, it will be held utterly void."

Mr. Fonblanque has also, with great propriety, remarked that "the only restrictions which the law of England imposes are such as are dictated by the soundest policy, and approved by the purest morality. That a parent, professing to be affectionate, shall not be unjust; that, professing to assert his own claim, he shall not disappoint or control the claims of nature, nor obstruct the interests of the community; that what purports to be an act of generosity shall not be allowed to operate as a temptation to do that which militates against nature, morality, or sound policy, or to restrain from doing that which would serve and promote the essential interests of society—these are rules which cannot reasonably be reprobated as harsh infringements of private liberty, or even reproached as unnecessary restraints on its free exercise."

Godolphin, likewise, has very correctly laid down the general principle that "all conditions against the liberty of marriage are unlawful"—so that the marvel would seem to be that courts should have so differed in the application of such obvious principles as to leave, perhaps, the preponderance of that description of authority in favor of the opinion which we have thus reversed.

THE PRINCIPAL CASE IS CITED to the point that "the policy of the law being to encourage marriage, contracts imposing general restraint on marriage are void," in 1 Wharton on Cont., sec. 396: See also Parsons on Cont., 4th ed., 556. See also *Pringle v. Dunkley*, *ante*, p. 110, and note thereto.

MORRISON v. SMITH.

[13 MISSOURI, 234.]

WHERE SEVERAL NAMES ARE INDORSED IN BLANK upon the back of a negotiable instrument, the holder cannot fill in the blank above each so as to make it a joint assignment of all.

THE petition set forth a certain promissory note, indorsed successively by one Woodfolk and one Stephenson, the payees, and by them indorsed to defendants, and by defendants indorsed to plaintiff. At the trial, the plaintiff introduced in evidence the note set forth in the petition, and admitted that

there, at the time of the trial, he had filled up the indorsement by writing over the names of Woodfolk and Stephenson, "Pay the within to J. F. Smith and S. H. Robbins," and over defendants' names an order to pay Guy Morrison. The effect of this indorsement was the only question about which there was any dispute. The court below nonsuited plaintiff, holding that the indorsement of the defendants should have been several and consecutive, and not joint. The plaintiff's motion to set aside the nonsuit was denied, and he excepted. Said ruling is now assigned as error.

Gamble and Bates, for the plaintiff.

Hill, for the defendants.

By Court, RYLAND, J. The question in this case involves the right of a holder of a negotiable note indorsed in blank, by two or more persons having written their names thereon, to fill up the indorsement by simply writing over all the names one assignment, so as to make the assignment the joint act of all those whose names have thus been written.

The right of a holder to fill up blank indorsements is unquestionable; this power is given by every one who thus writes his name on negotiable or assignable paper. But this is not the question. Can the holder, instead of filling up from one to another so as to make a regular claim to the last indorser and from him to the holder, make one indorsement over all the names to himself?

I have no doubt that by the consent or by the agreement of the persons whose names are indorsed on the note that such may be made a joint indorsement, but without such understanding or agreement each indorser must be considered a separate actor, who assigns the note and who becomes liable by such assignment.

In this case, the plaintiffs in error contend that the court below should have given judgment in their favor, because they set out a joint indorsement in their declaration, and proved it before the court. This reasoning is specious. The court below decided that without showing some authority or agreement by the indorsers that their act was to be considered a joint one, the law presumed it not to be such; and without such authority or agreement, or consent on the part of the indorsers, the plaintiff's counsel had no right to make such joint indorsements, and consequently his act was void and there was no legal proof of such joint indorsement.

I feel unwilling to make any decision that may unsettle the

general understanding of those concerned most in the use of such negotiable paper, as regards the practice and decisions of our courts.

The indorsement of the note by Smith is an undertaking by him to pay Robbins, and by Robbins to pay the holder in the absence of all proof that Smith and Robbins jointly indorsed the same. I think that public policy is best promoted by adhering to the practice which makes these indorsements separate, and not the joint act of all those whose names are put on the back of the note.

It has been well observed by the defendants' counsel that the rule applicable to commercial paper is in force in this case, and the holding these defendants as joint indorsers would authorize all indorsements to be held to be joint; and would destroy and violate the rights of a last or subsequent indorsee, and overturn the principles applicable to bills and notes, and the rights and liabilities of indorsers.

For these reasons, I feel inclined to support the judgment of the court below.

Judgment affirmed.

NAPTON, J., concurred.

THE PRINCIPAL CASE IS CITED to the point that a change cannot be made in the terms or any part of a note without the consent of all parties to it, in Daniel on Neg. Inst., sec. 1401.

STATE v. SHIELDS.

[13 MISSOURI, 233.]

INQUIRIES INTO CHARACTER OF WITNESS FOR PURPOSE OF DISCREDITING HIM may extend to his general moral character.

INQUIRIES INTO CHARACTER OF WITNESS FOR CHASTITY are permissible for the purpose of discrediting her.

APPEAL from the St. Louis criminal court. The opinion presents the case.

Hall, for the appellant.

Lackland, for the state.

By Court, NAPTON, J. Shields was prosecuted before a justice of the peace for an assault and battery upon one Mary A. King, and being convicted and fined, appealed to the criminal court. Upon the trial before the criminal court, the principal witness for the prosecution was Mary A. King. And upon the

cross-examination of another witness for the prosecution, the witness was asked by the defense: "Do you know the general character of Mary A. King, the prosecuting witness?" This question was objected to, and the objection sustained. The witness was then asked if he knew her general character for chastity, and this question was also excluded.

It seems to be the better and more settled opinion, in discrediting a witness, that a party is not restricted to inquiries into the character of that witness for veracity. A bad moral character generally, or a depravity not necessarily allied to a want of truth, may yet to some extent shake the credibility of a witness, and therefore is a fair subject of investigation. The questions propounded in this case were proper, although they must necessarily, to have had any sensible impression upon the case, have been followed by others eliciting the opinion of the witness upon the effect which the general or specific moral depravity spoken of had upon the credibility of the witness attacked. The entire exclusion of the questions seems to have proceeded upon the ground that the general bad character was inadmissible unless it was a general bad character for truth and veracity.

The judgment must be reversed, and the cause remanded.

TO IMPRACH WITNESS IT IS PROPER TO INQUIRE WHAT IS HIS GENERAL CHARACTER, as well as to inquire whether he is entitled to credit upon oath: See *Blus v. Kibby*, 15 Am. Dec. 95.

EVIDENCE OF GENERAL CHARACTER OF FEMALE WITNESS FOR CHASTITY is inadmissible for the purpose of impeaching her credibility: *Gilchrist v. McKee*, 28 Am. Dec. 721, and note. Evidence that a woman is a common prostitute is inadmissible to impeach her: *Commonwealth v. Churchill*, 45 Id. 229, and note, where all the authorities in this series are collected.

LOVE v. FAIRFIELD.

[18 MISSOURI, 300.]

PARTIAL ASSIGNMENT OF JUDGMENT WITHOUT CONSENT OF JUDGMENT DEBTOR does not affect him.

In April, 1846, Fairfield sued Love for trespass, and recovered judgment against him for eight hundred dollars. An execution issued to the sheriff, and was by him returned "satisfied in full," at the request of the plaintiff Fairfield. Field & Hall, in November, 1846, filed their motion in the circuit court to vacate the above order of satisfaction, and award execution on said judgment, for the reasons that the said Field & Hall had

five hundred dollars' worth of said judgment assigned to them prior to the order of satisfaction above mentioned, and that said Love knew of said interest at the time he settled with Fairfield. Upon the hearing of the case, the circuit court ordered said satisfaction vacated and execution to issue to Field & Hall for the amount of their share. Love moved for a rehearing, which was denied, and he then filed his bill of exceptions. The remaining facts, as far as necessary for a proper understanding of the opinion, are stated in it.

Polk and Gantt, for the plaintiff.

Crockett and Briggs, for the defendant.

By Court, RYLAND, J. The main question, from the above statement of the case, involves the right of a party to assign to another a part of a judgment at law. Can the payee of a chose in action assign a part thereof to another so as to affect the rights of the payor without his assent?

The validity of an assignment of a part of a judgment is a question which was not passed upon by this court, in the case of *Laughlin v. Fairbanks and Lisle and Edwards*, 8 Mo. 369, because it was not made. It did not occur to the court that there could be any doubt about the right to assign a part as well as the whole of a judgment.

The words "part" and "whole" being terms familiarly used in mathematics, the mind too readily assented to the power or right of him to assign a "part," who could legally assign the "whole," without considering the consequences and legal bearing of this question.

Upon examination, we find it asserted in several cases, and especially in the case of *Mandeville v. Welsh*, 5 Wheat. 277, that a court of law will not interfere to protect a partial assignment of a chose in action. The reason for the distinction, as expressed by Judge Story in the case first cited, is this: "A creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor; since it may subject him to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any legal or equitable assignment by which it may be broken into fragments; when he undertakes to pay an integral sum to his creditor, it is no part of his contract that he shall be obliged to pay in fragments to any other persons." A judgment, so far as its assignable quality is concerned, is like any other chose in action. If the doctrine be applicable to the

assignment of funds, either general or special, secured by simple contract specialty; negotiable or not negotiable, no reason is perceived why it does not extend to an assignment of a judgment. Every reason for the doctrine has much application in the one case as in the other.

That such assignment may create equities between the immediate parties, the assignor and assignee, is a matter not now important to inquire into; but the original debtor must be a party consenting to such arrangement, before he can be affected by it. If a part of a judgment can be assigned, we know of no point at which its divisibility can be checked. It may be divided into numerous aliquot parts, and each part assigned to different individuals.

Would not this be a great inconvenience to the debtor, and one to which he cannot be subjected without his consent? We have not found any case in which a part of a judgment has been assigned, and therefore have found no decision directly upon the point. But is it not some evidence that such a practice is not tolerated from the fact that it seems not to have occurred? It is remarkable that no case can be found tolerating such an assignment. This circumstance alone is calculated to make against the claim.

Choses in action were not assignable at common law; courts of equity, however, took charge of the interest of the assignee; and then the courts of law were forced to take notice of them.

But there is no policy in carrying the doctrine now held any further. Said transactions, at best, tend to promote litigation, to increase costs, and to prevent the amicable settlement of disputes between the parties originally only concerned. It is the interest of the state that litigation should not be encouraged.

The great tendency to promote champerty and maintenance, to prevent the parties themselves from making their own settlements of their disputes, to increase the number of suits, and to add to the burden of costs now sufficiently onerous already, has had much consideration with this court in forcing us to the conclusion that such partial assignment of a judgment, without the assent of the debtor, shall not affect him.

From this view of the subject, it will not be necessary for us to decide the question of notice of the assignment of part of the judgment to Messrs. Field & Hall, previous to the arrangement between Love and Fairfield, by which the execu-

tion was ordered to be returned satisfied, and was so returned by the sheriff.

There is no pretense that such assignment of a part of the judgment was made by the consent of Love; indeed, there is very great doubt whether he knew anything of such assignment before himself and Fairfield settled. The judgment of the circuit court sustaining the motion of Field & Hall, "to award execution on the judgment against said defendant, and to vacate the entry of satisfaction on the execution by Fairfield," is erroneous, and the said motion should have been overruled.

The judgment of the circuit court is therefore reversed, and this cause is remanded to said circuit court, with directions to overrule said motion.

"JUDGMENTS, LIKE OTHER CHOSSES IN ACTION, cannot be assigned in part without the assent of the debtors, for the reason that entire demands cannot, against their objection, be split, for the purpose of annoying defendants:" Freeman on Judgments, sec. 424, citing the principal case.

ROLLINS v. STATE.

[13 MISSOURI, 437.]

WHERE OFFICER DEPARTS FROM HIS LINE OF DUTY POINTED OUT BY LAW, at the promptings of the plaintiff, his securities are discharged, and he becomes the plaintiff's agent.

OFFICER WHO COLLECTS MONEY UNDER INVALID PROCESS must pay the same; and his securities are responsible for its misapplication.

APPLICATION FOR WRIT OF ATTACHMENT BY PLAINTIFF is not such an interference as will make the officer who issues or executes it his agent.

DEBT against Rollins and others, sureties upon the official bond of one Hamilton, sheriff of Boone county. At the trial, it was agreed that a writ of attachment at the suit of the present plaintiff, against Ward & Parsons, had been issued out of the circuit court, and directed to said Sheriff Hamilton, and that he, by virtue of said writ, levied upon a large amount of merchandise as the property of the said defendants, without suit. Upon the petition of plaintiff, an order to sell said goods was duly made, the terms of said sale being partly cash, and the remainder in bonds with security payable to said Sheriff Hamilton. The said sheriff made said sale in accordance with said order of court, and at different times during three or four years paid over different sums of money, amounting to several thousand dollars, and the remainder, which at the time of the suit amounted, with interest, to three thousand three hundred and

thirty-seven dollars and sixty-four cents, he refused to pay, although often thereunto requested. Hamilton died in 1845, and his estate was never administered upon. Some instructions were given and some refused, that issues of law might appear upon the record. Judgment was given by the court for the above sum of three thousand three hundred and thirty-seven dollars and sixty-four cents, and defendants took this appeal.

Hayden, for the plaintiffs in error.

Leonard, for the defendant in error.

By Court, NAPTON, J. The question which, in our judgment, is decisive of this case, is whether the sheriff in the execution of the writ of *venditioni exponas* was acting *colore officii*, or was the mere agent of the plaintiffs.

The cases upon this subject, most of which will be found cited in the briefs, clearly show that where an officer departs from his line of duty, pointed out by the law, at the promptings of the plaintiff, his securities are discharged.

The responsibility of an officer bound by law to sell for cash, and cash only, is materially different from a responsibility for credit sales. The risk is greater. The case of *Kimball & Co. v. Perry*, 15 Vt. 414, is a sensible commentary upon this distinction, and establishes that, if such sales are undertaken at the instance of the creditor or the creditor's attorney, the securities of the officer are not responsible.

I think most if not all the cases cited, where the courts have held the securities discharged, will be found cases where there has been an interference by the plaintiffs in the writs. In such cases, the party, by directing the officer to proceed in some other way than that prescribed by the law, makes the officer his agent, and the securities are no longer liable for his acts. The practice and propriety of this are so manifest as to need no illustration.

On the other hand, it seems to be equally well settled, and is consonant to justice and policy, and where the officer professes to act under color of his office, and under the sanction of a writ, the responsibility of his securities for any malfeasance in its execution is not discharged by reason of defects or errors or total illegality in the process. It would be strange if the law were otherwise. Where a court has jurisdiction of the action, the officers are not responsible for errors in the process. If the officer proceeds on the process and treats it as valid, he is bound to pay the money he collects under it, and the money

being received by him *colore officii*, his sureties are liable for its misapplication: *Walden v. Davison*, 15 Wend. 575.

The question is in this case, as in others of a similar character, Was the act official or personal?

It is clear that there was no departure from the mandates of the writ and no interference on the part of the plaintiffs after its issuance. The sheriff did not profess to sell by virtue of any directions from the plaintiff, but in obedience to the order of the writ of *venditioni*. The fact that this order was erroneous, and might perhaps have been disregarded, cannot alter the case. The application for the writ is no such interference of the plaintiffs as makes the officer their agent. All writs issue on the application of some one, and the machinery of the law must be put in whenever it acts at all. The writ was issued on the order made by a court having jurisdiction over the subject-matter. It is neither justice nor sound policy that private individuals should suffer by the blunders of the officers of the law, either judicial or ministerial. We cannot regard the writ or order as a mere nullity. Would the sheriff have been liable as a trespasser for proceeding under it? We think not.

Judgment affirmed.

For a full discussion of the liabilities of sureties on official bond of sheriff, see note to *Commonwealth v. Cole*, 46 Am. Dec. 509.

POWELL v. GOTT.

[13 MISSOURI, 458.]

JUDGMENT ENTERED AGAINST INFANT is not an irregularity, but an error.

WRIT OF ERROR CORAM NOBIS MAY BE BROUGHT AT ANY TIME. The statutory limitation relates solely to errors of law.

WHERE INFANT AGAINST WHOM JUDGMENT HAS BEEN RECOVERED APPEARED BY ATTORNEY, he may, upon motion, when he becomes of age, have the same set aside.

ERROR to the Montgomery circuit court. The opinion states the case.

Buckner, for the plaintiff in error.

Porter, for the defendant in error.

By Court, NAPTON, J. This was a motion to set aside a judgment obtained against an infant who appeared by attorney. The judgment was rendered in 1841, and the motion was made in 1847, about two years after the defendant attained his majority. The motion was supported by several affidavits,

both of the petitioner and others of his family, to establish the truth of the facts stated therein. The motion was overruled by the circuit court.

This is in the nature of a writ of error *coram nobis*. The object of this motion is to correct an error in fact, upon which certain proceedings in law have been based.

The objections taken to the motion here are, first, that the motion came too late, having been made after the infant attained his full age; second, that our statute of limitations upon writs of error, and the eighth section of the seventh article of the act concerning practice at law, constitute a bar from lapse of time.

The section above referred to provides, that "judgments in any court of record shall not be set aside for irregularity on motion unless such motion be made within five years after the term such judgment was rendered."

This section we deem inapplicable to the present motion, for the reason that the entering of a judgment against an infant is not an irregularity, but an error: *Ex parte Toney*, 11 Mo. 663. Nor do we think the limitation of five years, fixed by our statute, which regulates writs of error to the supreme court, applicable, because the error complained of here is not one of law but of fact. The whole of our act regulating the practice in the supreme court, and writs of error generally, most manifestly is intended to apply to writs brought to correct errors of law. There is no limitation to be found in our statute-book to a writ of error *coram nobis*—or a proceeding to correct a judgment of law founded upon an error of fact. The rare occurrence of such proceedings has doubtless caused them to be overlooked by the legislature. The courts have no power to supply the omission.

The first objection is not tenable. The old rule for setting aside fines and recoveries on account of the infancy of the party levying the fine or suffering the recovery is not at all analogous to the present case. These were kinds of record conveyances, equivalent to judgment—and the question of infancy was passed upon by the courts, when they permitted the fines or recoveries to be had. The judges were specially directed by the act of parliament, under which these proceedings were had, to see that the party appearing and acknowledging the fine was of full age, but in the present case the party appeared by attorney in the usual way, and the fact of infancy was not passed upon. It was assumed that the party was of full age, and the whole proceeding was based upon that

assumption. It is now asserted that the fact was otherwise, and there is nothing on record to debar the defendant from so asserting.

Judgment reversed, and cause remanded.

JUDGMENT AGAINST INFANT HEIRS for whom no guardian *ad litem* has been appointed is voidable: *Porter v. Robinson*, 13 Am. Dec. 153. Erroneous judgments are valid until reversed: See *Doe v. Rue*, 29 Id. 368; *Hall v. Benner*, 31 Id. 394; *Roach v. Martin*, 27 Id. 746; *Winslow v. Anderson*, 32 Id. 650, and note thereto. As to force and effect of judgments against infants, see Freeman on Judgments, sec. 151.

THE PRINCIPAL CASE IS CITED to the point that a judgment obtained against an infant who appeared by attorney may be set aside on motion, in *Stepp v. Holmes*, 48 Mo. 89.

EX PARTE FEARLE & LEWIS.

[13 MISSOURI, 467.]

MONEY IN HANDS OF SHERIFF IS NOT SUBJECT TO LEVY, as it is in the custody of the law.

MONEY COLLECTED BY SHERIFF UNDER EXECUTION, in favor of one against whom he also holds an execution, may be applied by him towards the satisfaction of said second execution, unless the legal or equitable title has passed to some third person.

ERROR to circuit court. The opinion states the case.

Turner, for the plaintiff in error.

Davis and Shackelford, for the defendant in error.

By Court, **NAPTON, J.** The opinion of the circuit court, in ordering the sum of one hundred dollars to be paid over to Fearle & Lewis, seems to have been based upon the fact that this sum was paid to the sheriff on the same day on which the assignment to Shephard was made, and that, consequently, the lien of the execution attached before the assignment could transfer the property. We presume that if the assignment had been held void, because of fraud, the court would have directed the entire amount of the execution to have been paid over.

The case of *Turner v. Fendall*, 1 Cranch, 117, seems to hold the doctrine that money in the hands of the officer is not subject to levy, as it is in the custody of the law, and not the property of the plaintiff in the execution. Judge Marshall, however, observes that it is the duty of the officer to seize it the moment it is paid over into the hands of the creditor; and as the payment, under these circumstances, would be a vain

ceremony, no court would hesitate to justify the payment in satisfaction of the second execution, or if the money was brought into court, to direct it to be so paid, unless the legal and equitable right was in some third person.

The officer did right, we think, in waiting for the directions of the court, and the court was clearly authorized to direct the whole amount to be paid over, unless the assignee, Shephard, had a legal and equitable right to such proceeds. Who then is to decide this? No jury was demanded in this case, and the court was called upon to determine the motion.

If the court had ordered the entire amount of the execution of the plaintiff to have been first paid, we should not have considered such order erroneous.

What were the facts? After an execution from a justice had been returned *nulla bona*, and the transcript was filed in the circuit court, and an execution put in the hands of the sheriff, and on the very same day when the defendant in the second execution had paid over to the sheriff one hundred dollars, the defendant Spicer, who was insolvent, as the return of the constable showed, assigns the judgment over to Shephard. No money is passed, but a previous indebtedness is pretended. If ever there was a fraud in law, a *prima facie* fraud, this would seem to be one.

But whether the assignment was fraudulent or not, if the property was in the hands of the law, and not the property of the plaintiff in the execution, and therefore not subject to be levied on, it ought surely to be held equally out of the reach of an assignment by the plaintiff in the execution. The only circumstance that kept the money from the plaintiff's execution was, that it was in the hands of the sheriff, and under our statute could not even be garnished. Shall the defendant in the execution, under these circumstances, be permitted to withdraw this amount from the operation of the execution and put it in the hands of even a *bona fide* creditor? If he can, it is a manifest injustice to the vigilant creditor. The law which is said to favor the vigilant would no longer do so.

We think the circuit court was right in disregarding the assignment, so far as the execution creditor was concerned. As no complaint is made of the court because of limiting his order to the one hundred dollars, judgment is affirmed.

PROPERTY IN CUSTODY OF LAW CANNOT BE ATTACHED: See *Hackley's Ex'r's v. Swigert*, 41 Am. Dec. 256. Money belonging to judgment debtor in the hands of a sheriff may be appropriated by him to satisfy an execution in

his possession: See *Dolby v. Mullins*, 39 Id. 180; see also *Doe ex dem. Reynolds v. Ingersoll*, 49 Id. 57.

THE PRINCIPAL CASE IS CITED in Freeman on Executions to the point that the authorities are almost unanimous in sustaining the proposition that when a sheriff or constable has collected money on execution, it can neither be levied upon nor garnished by the same or another officer, under a writ against the judgment creditor: Freeman on Executions, sec. 130, and cases cited in note.

HARTT v. RECTOR.

[18 MISSOURI, 497.]

DESCRIPTION IN DEED—PAROL EVIDENCE TO SHOW MISTAKE.—Premises described as fractional north-west quarter of section 35, township 49, range 17, lying partially within the town of B.: *Held*, that the section and township description was the principal, and "lying partly within the town of B.," the incident, and that parol evidence was inadmissible for the purpose of showing that the south-west quarter was meant, and that there was no fractional north-west quarter-section.

EJECTMENT. The facts appear from the opinion.

Leonard, for the plaintiff in error.

Hayden and Adams, for the defendants in error.

By Court, RYLAND, J. This was an action of ejectment tried in the Cooper circuit court, in which the plaintiff suffered a nonsuit, on account of the rejection of certain evidence of title that he offered. The cause has been twice before in this court. It was brought here in August, 1842, by the plaintiff, and was reversed: See *Hartt v. Rector*, 7 Mo. 531. The plaintiff had a verdict at the next trial, which took place in 1843, and judgment thereon, which was reversed by this court in January, 1844: See *Rector v. Hartt*, 8 Id. 448 [41 Am. Dec. 650].

Upon the last trial, which took place in September, 1847, the plaintiff gave as evidence of title a patent from the United States to himself, Carroll, and Wallace, dated the nineteenth of November, 1822. In answer to this title, the defendants gave in evidence a judgment of this court, of the fifteenth of April, 1823, in favor of Thomas A. Smith, against George C. Hartt and George Tennell; an execution on this judgment of the tenth of October, 1828, and a sheriff's sale and conveyance of the seventeenth of February, 1829, to William M. Adams, for the whole quarter-section; also, conveyances from Adams to the defendants for the lot in controversy.

The plaintiff, in reply, then gave in evidence two judgments of the Cooper circuit court, against the plaintiff; one of the

twenty-sixth of January, 1821, in favor of G. James, and the other of the twenty-first of May, 1821, in favor of N. Nicholds; executions thereon of the ninth of August, 1823; a levy upon Hartt's interest in the "Boonville tract," being three and one half eighths; a *venditioni exponas* of the twenty-second of July, 1824; a sheriff's sale thereunder of Hartt's interest in the Boonville tract, made in July, 1824; an amended sheriff's return to the *venditioni exponas*, made in October, 1836; and a sheriff's deed of the twenty-seventh of October, 1836, to Geeshom Compton, of the land sold under the *venditioni exponas* and the acknowledgment and registry of this deed.

The original return to the writ of *venditioni exponas* stated the fact of the sale and payment of the purchase-money, but omitted to state the name of the purchaser, and this was supplied by the amended return.

The sheriff's deed was made upon the petition of Compton, by order of the Cooper circuit court, by the successor in office of the sheriff who made the sale. The plaintiff then offered to prove that at the time of the original levy and sale, the expression "Boonville tract" was well known in the neighborhood as the north-west fractional quarter of section thirty-five (35), township forty-nine (49), range seventeen (17) (the land sued for), and that this tract had acquired the appellation of the "Boonville tract," and was known by that description.

To this evidence, both written and verbal, the defendants objected, and the court sustained the objection, and rejected the evidence thus given by the plaintiff in reply.

The plaintiff then proved and read in evidence the following title paper: A conveyance of the fifteenth of April, 1823, from himself to Peyton Nowlin, acknowledged and recorded in Cooper county on the eleventh day of July, 1823, of his "undivided interest in and to three and one half eighths of the north-west fractional quarter of section 35, township 49, range 17, south of Missouri river, in trust to secure the payment of certain demands;" a writing of the first of September, 1825, executed by Nowlin, the trustee, stating the fact of the sale of the several tracts of land included in Hartt's deed of trust, to whom made, and the price given, in which it was stated that "the three and one half eighths of the north-west fractional quarter of section 35, township 49, range 17, including part of the town of Boonville, was sold to Geeshom Compton;" a conveyance on the eighth of July, 1836, from Nowlin, the trustee, to Geeshom, for several tracts of land included in the deed of

trust, and described in the certificate of sale as having been sold to Compton.

In this deed, the land in dispute is described, after reciting the deed of trust and the sale made under it, as all Hartt's "interest in the south-east fractional quarter of fractional section 35, township 49, range 17, including part of the town of Boonville, on the south side of the Missouri river and in Cooper county." The deed declares that the trustee sells such interest in these lands as he acquired under Hartt's deed of trust, and no more; a conveyance of the fifteenth of May, 1837, from Compton to Hartt of the land in controversy.

The plaintiff then proved that the north-west quarter was fractional, and made so by the Missouri river, and the only fractional quarter in the section; that a part of the town of Boonville was situated upon it, and that no part of the town was situated on the south-east quarter.

All the evidence of title was objected to by the defendants, and was excluded by the court, and thereupon the plaintiff suffered a nonsuit. The plaintiff afterwards moved the court to set aside this nonsuit, which motion the court overruled, and the plaintiff brings this cause here by writ of error.

To reverse the judgment of the circuit court, the plaintiff in error relies mainly on two grounds: 1. That the court erred in excluding his evidence of title, derived under the sheriff's sale in July, 1824, and the sheriff's deed in pursuance of this sale, dated the twenty-seventh of October, 1836; 2. That the court erred in excluding the plaintiff's evidence of title, derived from Nowlin's deed of July, 1836.

It therefore becomes necessary for me to examine these propositions, and if I find the law arising on either one to be for the plaintiff, then the cause will have to be remanded. I am relieved from all necessity of investigating the point first above set down. The principles stated by this court in the case of *Alexander and Betts v. Samuel Merry*, 9 Mo. 510, are conclusive upon this point. I shall therefore pass it by with merely stating that, in accordance with these principles, the circuit court did right in rejecting all the evidence offered by plaintiff below in regard to the same.

The second point is of much more difficult adjudication—the mistake as is alleged in the deed from Nowlin to Hartt. This deed is for the south-east fractional quarter of fractional section 35, township 49, range 17, including part of the town of Boonville, on the south side of the Missouri river, in Cooper

county. The plaintiff contends that it was intended for the north-west quarter, and not the south-east, and he offers to show and prove this by evidence, showing that the south-east quarter is not fractional, and that no part of the town of Boonville is situated on it; but that the north-west quarter is fractional, and is the only quarter that is fractional in said section, and that a part of the town of Boonville is situated on it. Many authorities are cited by the plaintiff's counsel, as well as by the defendant's, on this subject.

Greenleaf, in his treatise on the law of evidence, volume 1, page 332, section 301, and in the notes thereto, has laid down a general, and I think a correct, view of this subject: *Falsa demonstratio non nocet, cum de corpore constat*. This, says he, is the rule derived from the civil law. So much of the description as is false is rejected, and the instrument will take effect, if a sufficient description remains to ascertain its application.

Words necessary to ascertain the premises must be retained, but words not necessary for that purpose may be rejected, if inconsistent with others.

That an uncertainty which arises from applying the description contained in the will, either to the thing devised or to the person of the devisee, may be helped by parol evidence; but that a new subject-matter of devise, or a new devisee, where the will is entirely silent upon either, cannot be imported, by parol evidence, into the will itself. This is laid down as the doctrine concerning wills. The plaintiff seeks that it may be applied to the deed in this case. Be it so.

By the acts of congress, the public lands in the new states and territories have been surveyed and laid off in townships, ranges, sections, and the various subdivisions of sections, such as half-sections, quarter-sections, half-quarter-sections, and quarter-quarter-sections; and the United States grant their patents, and have them issued for lands thus marked, bounded, and described. A principal meridian line is laid down, then townships and ranges, so that a person of ordinary capacity can designate the tracts, and point out the lands and the various subdivisions; and he knows just as well what specific tract or parcel of land is pointed out by the description of the south-east fractional quarter of section 35, township 49, range 17 west, south of Missouri river, as if the external lines and corners thereof had been run, and marked, and platted down by the surveyor. Such a description is nothing more nor less than a description of the land by metes and bounds.

The deed in this case is for the south-east fractional quarter. It turns out that this quarter is not fractional. Must we, therefore, conclude that the deed is void? Let us reject the word "fractional," which is in this instance the *falsa demonstratio* of the civilians, and enough will still remain to convey the premises.

No part of the town of Boonville is situated upon it; reject this false demonstration, and enough still remains to convey the premises mentioned in the deed.

It is contended for the plaintiff in error that we must look to the words "fractional quarter," and "on which a part of the town of Boonville is situated," as the particular description, and as such must control the description of metes and bounds, thereby overturning the descriptive words "south-east fractional quarter of section 35, township 49, range 17 west, south of Missouri river."

But this construction is contrary to all rules, and would overturn the settled and long-established modes by which we designate our tracts or parcels of land.

When we sell by the descriptive terms of south-east fractional quarter of section 35, in township 49, of range 17 west, south of Missouri river, we specify and describe as particularly as if we marked out the boundaries and described each line and specified each corner. If it be not "fractional," or if no part of the town of Boonville be included in these lines, then these descriptive specifications, thus wanting, become what the civilians call *falsa demonstratio*, and must be rejected; nevertheless, enough still remains to pass the land by the deed.

On the other hand, let these descriptive specifications, thus wanting, become the governing and controlling descriptive words, and the incident will prevail over the principal, an absurdity into which I am unwilling to be driven.

Were I to convey by deed a lot in the city of Boonville, and describe it as lot number 10, in block number 5, on the plat of said town, said lot number 10 fronting on Main street sixty feet, and running back one hundred feet, to an alley fifteen feet wide, now in the possession of A B, and it should afterwards turn out that A B never was in possession of said lot, but was in possession of an adjoining lot, number 11, of the same dimensions, can it be maintained that the specification of the possession must control the other descriptive words in this deed, so as to authorize the courts to suffer parol evidence to prove that lot number 11 was meant to be conveyed

in this deed instead of lot number 10? See case of *Goodtitle v. Southern*, 1 Mau. & Sel. 299.

Upon the whole case, I am clear that the law, on the second point, as well as on the first, was properly ruled by the court below for the defendants.

The point about the condition precedent, in the deed of trust to Nowlin, we consider not necessary to be now passed on by this court.

Judge Napton concurring with me in this opinion, the judgment of the Cooper circuit court is affirmed.

SALES OF LAND BY SHERIFF UNDER EXECUTION ARE WITHIN STATUTE OF FRAUDS: *Robinson v. Garth*, 41 Am. Dec. 47; *Hand v. Grant*, 43 Id. 528, and note; *Chapman v. Harwood*, 44 Id. 736, and note.

WHERE DESCRIPTION IN DEED IS INCONSISTENT, part being false and part true, if the latter sufficiently describe the land, it is good, and the former will be disregarded: *Voe v. Handy*, 11 Am. Dec. 101; *Wendell v. Jackson*, 22 Id. 635, and note; see also note to *Atwood v. Cobb*, 26 Id. 661.

MOST CERTAIN OF TWO INCONSISTENT DESCRIPTIONS MUST PREVAIL: See *Melvin v. Proprietors etc.*, 38 Am. Dec. 384, and note; *Doe ex dem. Phillips's Heirs v. Porter*, 36 Id. 448, and note; also Freeman on Executions, sec. 299.

JOHNSON v. STEAMBOAT LEHIGH.

[18 MISSOURI, 532.]

OMISSION TO WRITE NAMES OF OBLIGORS IN BODY OF BOND does not avoid it, and it is binding upon all who sign it.

ACTION upon a bond given for the purpose of procuring the release of the steamboat Lehigh, which had been seized by the sheriff under a warrant from the circuit court. This bond was duly executed by Harris and Lacey and several others, but the names of the said Harris and Lacey were not written in the body of the bond; and upon their motion, a judgment which had been recovered against all of said obligors was for this reason set aside and annulled as to them. This is the only question upon which this appeal is taken.

M. L. Gray, for the plaintiff in error.

By Court, RYLAND, J. From the above statement, there is only one question for our adjudication; that is, Does the omission of the names of Harris and Lacey in the body of the bond, though the bond is executed by them otherwise, render the bond void as to them?

The plaintiffs in this court contend that it does not; the

defendants, that it does. The defendants rely upon the cases of *Adams v. Wilson*, 10 Mo. 341; and *Wood & Oliver v. Ellis, Adm'r etc.*, Id. 382. In these cases, this court did decide, upon the authority of 1 Tucker's Com. 275, that such omission of the names of the persons in the body of the bond, although their names were subscribed to the bond, rendered the bond void as to them.

This court has had occasion since these decisions to investigate this matter more thoroughly, and upon full examination we find that the authorities cited by Judge Tucker do not warrant and support his conclusions.

That such omission to insert the names of the persons in the face of the bond, and within the body of the bond, if the bond be by such persons subscribed, will not vitiate the bond and render it void, is supported by a string of authorities of such weight and learning as to render it strange how Judge Tucker could have adopted a different opinion: See the authorities cited by counsel in his argument.

This court, in two different cases since those reported in 10 Missouri, has determined this point contrary to the views contained in those opinions.

I am clear that the court below erred in setting aside the judgment in this case. This error was produced by the lower court following the decisions above cited from 10 Missouri. These have since been overruled as regards this point.

The judgment of the court of common pleas is therefore reversed, and cause remanded.

OBLIGORS' NAMES NEED NOT APPEAR IN BOND; it is sufficient if they are affixed to the instrument: See *Pequabett Bridge v. Mathes*, 28 Am. Dec. 737. Appeal bonds good without containing the names of the sureties in the body of the bond: *Cooks v. Crawford*, 46 Id. 93. The doctrine of the principal case is followed in *Cunningham v. State*, 14 Mo. 402.

CASES
IN THE
SUPERIOR COURT OF JUDICATURE
OF
NEW HAMPSHIRE.

TRUE v. RANNEY.

[21 NEW HAMPSHIRE, 52.]

WANT OF CONSENT OF CAPABLE PERSONS WILL INVALIDATE MARRIAGE, like all civil contracts.

MARRIAGE WILL BE INVALID IF ONE OF THE PARTIES IS SO IMBECILE as not to understand the nature and obligation of the contract.

LEX LOCI CONTRACTUS DETERMINES VALIDITY OF MARRIAGE CONTRACTS in general; but this rule holds only when not opposed to the religion, morality, or municipal institutions of the country in which it is sought to be applied.

LEX LOCI CONTRACTUS WILL NOT PREVAIL, if recognizing as valid a marriage entered into by an imbecile.

PETITION for a decree of nullity of marriage. The evidence showed that the petitioner was over twenty-one years old, resided in New Hampshire with her parents, and was of a very simple mind. She could not wash or dress herself properly or decently, knit or sew, or take care of her clothes. She could not distinguish colors, or cotton from flannel. She could not be taught to cook, or to do the simplest household work. She went to school until she was twenty, but could hardly read, could not spell, add or abstract figures, count beyond twenty, state the number of sabbaths in the year, could be taught nothing of geography, and spoke of matters to the master to which females of her age would not allude. She could not tell the time of day by a watch, or distinguish one piece of money from another, and had no idea of the value of property. She played with children four or five years old, and with their toys, and could not be trusted to go on errands. She secretly met

Ranney one evening, and they went together into Vermont, where the marriage was solemnized. She afterwards returned to her father's house, whereupon this proceeding was instituted by her next friend.

Blaisedell, for the petitioner.

Cushing and Metcalf, for the respondent.

By Court, GILCHRIST, C. J. Allusion is made to a decree of "divorce or nullity" by this court in the revised statutes, c. 148, secs. 2, 12, 13. No mode is prescribed, either in the constitution or the statutes, in which proceedings shall be instituted and carried on, for the purpose of procuring a decree of nullity of marriage; but that the court have the power to make such a decree, and to regulate the mode of procedure, we think is beyond doubt: 2 Kent's Com. 76. There is a provision in section 7, chapter 148, that every libel shall be signed by the libellant, if of sound mind, and at the age of legal consent; otherwise, by the parent, guardian, or next friend of such libellant.

The consent of the parties is essential to the validity of all contracts; and as marriage is a contract, it is essential to its validity that the parties should understand the nature of the agreement they are about to enter into: *Londonderry v. Chester*, 2 N. H. 278 [9 Am. Dec. 61]; *Clark v. Clark*, 10 Id. 382 [84 Am. Dec. 165]; 1 Bla. Com. 433. In the case of *Turner v. Meyers*, 1 Hag. Con. 416, 417, Lord Stowell said a defect of capacity invalidates the contract of marriage as well as any other contract. It is true that there are some obscure *dicta* by the earlier commentators on the law that the marriage of an insane person could not be invalidated on that account; founded on some notion that prevailed in the dark ages of the mysterious nature of the contract of marriage, in which its spiritual nature almost entirely obliterated its civil character. In more modern times, it has been considered in its proper light, as a civil contract as well as a religious vow; and, like all civil contracts, will be invalidated by want of consent of capable persons. So in the case of *Browning v. Reane*, 2 Phillim. 70, Sir J. Nicholl, after quoting Blackstone, said: "Here, then, the law, and the good sense of the law, are clearly laid down; want of reason must of course invalidate a contract, and the most important contract of life, the very essence of which is consent. If the incapacity be such that the party is incapable of understanding the nature of the contract itself, and incapable, from mental imbecility, of taking care of his

or her own person or property, such an individual cannot dispose of her person and property by the matrimonial contract, any more than by any other contract." A marriage *de facto*, under circumstances of privacy, inferring fraud and circumvention between a person of weak and deranged mind, and the daughter of his trustee and solicitor, who had great influence over him, and by whom he was clearly considered and treated as of unsound mind, was pronounced null and void: *Portsmouth v. Portsmouth*, 1 Hag. Ec. 355.

The evidence in the case satisfies us, as we think it cannot fail to satisfy any reasonable man, that the petitioner was so imbecile that she was entirely unable to understand the nature and obligation of the contract into which it was proposed she should enter. There is every reason to believe that no person so lamentably imbecile as this young woman appears to be could have the remotest idea of the meaning of a contract for the performance of any of the ordinary duties of life, and still less of a contract of marriage.

The marriage ceremony was performed in the state of Vermont, and how far the *lex loci contractus* is to affect the obligation of the contract in a case like this, is a matter to be inquired into.

The doctrine of trying contracts, especially those of marriage, according to the laws of the country where they were made, is practiced in all civilized countries, and is agreeable to the law of nations. It is the consent of all nations, it is the *jus gentium*, that the solemnities of the different nations with respect to marriages should be observed, and that contracts of this kind are to be determined by the laws of the country where they are made. But although this principle is of general obligation, nevertheless, like every other general rule, it is subject to some limitations. The rule holds only where it does not stand opposed to the religion, morality, or municipal institutions of the country in which it is sought to be applied. The rule will not be enforced to the danger of these, because it is the first duty and law of every state to preserve its religion pure, and its institutions entire. It has been said by an eminent Scottish judge, that "a party who is domiciled here cannot be permitted to import into this country a law peculiar to his own case, and which is in opposition to these great and important public laws, which our legislature has held to be essentially connected with the best interest of society:" Lord Robertson Fergusson on Mar. & D. 397. Thus, the *lex loci* was not allowed to prevail where one of the parties

was incapacitated by the law of his domicile from making the contract, and was not relieved from his incapacity by a transient visit to Scotland. One of the parties had been married before, and divorced in Scotland. At the time of the divorce and second marriage, he was domiciled in England. According to the law of England, the first marriage had not been dissolved, and, therefore, the party was incapable of contracting a second marriage: *Beazley v. Beazley*, 3 Hag. Ec. 639. So, if a foreign state should allow marriages clearly incestuous by the law of nature, they would not be allowed to have validity elsewhere: *Greenwood v. Curtis*, 6 Mass. 378 [4 Am. Dec. 145]; *Medway v. Needham*, 16 Id. 157 [8 Am. Dec. 131]; *Putnam v. Putnam*, 8 Pick. 433.

We have no doubt that the tribunals in Vermont would adjudge the ceremony of marriage in this case to be of no binding force. Throughout the civilized world, the *consensus animorum*, the willing mind, is required as an essential attribute of this contract. But the intelligence was wanting, to enable the party to give consent. She acquiesced in what was done, but the acquiescence came from the lips only, and not from the mind. We are, therefore, of opinion that there should be a decree of nullity of marriage.

MARRIAGE OF PERSONS INCAPABLE OF GIVING CONSENT VOID: See note to *Jackson v. King*, 15 Am. Dec. 368; note to *Jenkins v. Jenkins's Heirs*, 26 Id. 437; *Crump v. Morgan*, 40 Id. 447; *Foster v. Means*, 42 Id. 332; note to *Gallings v. Williams*, 44 Id. 55. An action to nullify a marriage on the ground of insanity may be brought in the lunatic's name by her committee: *Crump v. Morgan*, *supra*.

LEX LOCI CONTRACTUS DETERMINES VALIDITY OF MARRIAGE CONTRACTS IN GENERAL: *Medway v. Needham*, 8 Am. Dec. 131, and note; *Fornhill v. Murray*, 18 Id. 344; *Sneed v. Rhwing*, 22 Id. 41; *Harding v. Alden*, 23 Id. 549; *Phillips v. Gregg*, 36 Id. 158; *West Cambridge v. Lexington*, 11 Id. 231; but see note to *Medway v. Needham*, and also *Phillips v. Gregg*, and *Sneed v. Rhwing*, *supra*. Parol evidence of laws and customs of another state regulating the manner of celebrating marriage, and the legal presumptions there adopted by the courts, arising from cohabitation, in support of the existence of a marriage, may be received: *Taylor v. Swett*, 22 Id. 156.

LEX LOCI AS GOVERNING RIGHTS OF SPOUSES: See *Allen v. Allen*, 39 Am. Dec. 553, and the prior cases in this series collected in the note.

LEX LOCI, HOW FAR GOVERNS CONTRACTS IN GENERAL: See *Jordan v. Thornton*, 44 Am. Dec. 546, and prior cases collected in note; *Larrabee v. Talbot*, 46 Id. 637.

POWERS v. SHEPARD.

[21 NEW HAMPSHIRE, 60.]

JURAT OF DOCUMENT MUST SHOW that the oath was administered by the person subscribing the *jurat*.

DEPOSITION IS INCOMPETENT EVIDENCE when the words "before me," in the caption, preceding the name of the magistrate before whom the deposition purported to be taken and sworn, were omitted.

CASE for deceit in the sale of a horse. At the trial, the defendant offered in evidence several depositions, from the captions of which the words "before me," preceding the name of the magistrate before whom the depositions were taken and sworn, were omitted. The plaintiff objected to the captions, but the objection was overruled, and the depositions were read in evidence. A verdict having been returned for the defendant, the plaintiff moved to set it aside, and for a new trial, on account of the admission of the evidence.

Cushing, for the plaintiff.

Lovell, for the defendant.

By Court, GILCHRIST, C. J. There is nothing in the language of the statute, or of any rule of court, which in terms requires that the words which were omitted in these captions should be inserted. But it does not therefore follow that they are unnecessary to the sufficiency of the captions. There is no rule more important to be observed than that documents, confirmed by oath, should set forth that they are sworn before a person having proper authority. The authority is given by statute, and we cannot see that it has been duly exercised, unless the *jurat* shows it. The strictness to be observed in this respect does not depend on the existence of rules of court, nor is it to be departed from because the statute is silent on the subject. It depends on the necessity of the thing itself. The objection may seem to be of but little importance; but if we are ever to use strictness, it should be in regard to depositions, and in all that relates to their captions. Here, it is consistent with this *jurat* that the oath was not administered by this magistrate at all. It may be true that the deponent made oath as he is stated to have done in the caption, but that oath may have been administered by some incompetent person, and not even by a justice of the peace. There are two decisions to be found in the books expressly on this point, the omission of the words "before me." One is the case of *Queen v. Bloxham*, 6 Ad. &

EL., N. S., 528. We have given the substance of the reasoning of the court in the above remarks. The other is the case of *Regina v. Norbury*, Id. 534, note, in which case the court expressly approve the decision in *Queen v. Bloxham*, *supra*. Upon these authorities, and also because we approve of their reasoning, and think the decisions correct, we think the captions in the present case are defective. There must, therefore, be a new trial, as the depositions were incompetent evidence.

Verdict set aside.

CAPTION OF DEPOSITION NEED NOT SPECIFY the kind of action in reference to which it is taken, when a statute provides that it shall state "the cause in which the deposition is to be used:" *Scott v. Perkins*, 48 Am. Dec. 470.

OFFICER TAKING DEPOSITION IS PRESUMED TO HAVE AUTHORITY to do so until the contrary appears: *Crane v. Thayer*, 46 Am. Dec. 142.

THE PRINCIPAL CASE IS CITED AND FOLLOWED in *Dane v. Mace*, 37 N. H. 534, in holding that an objection to the admission of a deposition was properly sustained because it did not appear before whom it was taken.

ROBERTS v. JENKINS.

[21 NEW HAMPSHIRE, 116.]

WARRANTY OF SOUNDNESS OF HORSE IS NOT BROKEN by a curable and temporary injury existing at the date of the sale, not injuring him for immediate service. It seems, however, that the warranty is broken if the infirmity, although not permanent or incurable, renders the animal less fit for present use.

ASSUMPSIT on a promissory note given by the defendant to the plaintiff for the price of a horse. The defense was that the horse was warranted sound, and being found otherwise, was duly returned, etc.; and the plaintiff conceded that if the horse was unsound at the time of the sale, the action could not be maintained. It appeared that the horse had been injured in the left hind leg, and evidence tended to show that this injury had never been fully removed, and was permanent. It also appeared that the horse had a defect, either temporary or permanent, in the hock. The substance of the instructions to the jury appears in the opinion. The defendant moved to set a verdict for the plaintiff aside, and for a new trial, for error in these instructions.

Butters, and Pierce and Minot, for the plaintiff.

Norris, for the defendant.

By Court, Woods, J. The court instructed the jury, in substance, that a permanent injury existing at the time of the sale of a horse would constitute a breach of the warranty of soundness. Whether the instructions were thus far strictly correct, it is not necessary now to determine. It is sufficient to say that they were at least sufficiently favorable to the defendant. The court further instructed the jury, in effect, that a curable and temporary injury, existing at the date of the sale of the horse, not injuring him for service, was not a breach of warranty of the soundness of the horse. The correctness of the latter branch of the instructions is alone questioned. The question made in this case is not a new one in courts of justice, although it is not found to have been settled by the reported decision in this state. What character or extent of injury, arising from disease or accident, will constitute a breach of warranty of the soundness of a horse, is a question which has considerably engaged the attention of the courts in England and in this country. And although some difference of opinion is found to have existed among eminent judges upon the point, yet the general rule is believed to be now well settled in the books.

Mr. Chitty, in his learned treatise on contracts, states the rule thus: "If, at the time of the sale, the horse has any disease which either actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description, or which, in its ordinary progress, will diminish the natural usefulness of the animal, or if the horse has, either from disease or accident, undergone any alteration of structure that either actually does at the time, or in its ordinary effects will, diminish the natural usefulness of the horse, the horse is unsound. And therefore a cough which renders a horse less fit for present use, but is not calculated permanently to diminish his usefulness, and from which he ultimately recovers, is an unsoundness constituting a breach of warranty. So any organic defect is unsoundness; and therefore a nerved horse cannot be considered sound, or a horse afflicted with a bone-spavin in the hock. But mere badness of shape, though it should render a horse unfit for work, is no unsoundness or breach of a general warranty."

The case of *Elton v. Brogden*, 4 Camp. 281, was an action upon a warranty of the soundness of a horse. And it was proved and admitted that the horse was lame at the time of the sale; but the defendant undertook to prove that the lam-

ness was of a temporary nature, and that he had become in all respects sound.

Lord Ellenborough said: "I have always held, and now hold, that a warranty of soundness is broken, if the animal, at the time of the sale, had any infirmity upon him which rendered him less fit for present service. It is not necessary that the disorder should be permanent or incurable. While a horse has a cough, I say he is unsound; whether that be temporary or prove mortal. The horse in question, having been lame at the time of the sale, when he was warranted to be sound, his condition subsequently is no defense to the action."

And in *Elton v. Jordan*, 1 Stark. 127, which was also an action on a warranty of the soundness of a horse, the same learned judge states the rule to be, that "to constitute unsoundness, it is not essential that the infirmity should be of a permanent nature; it is sufficient if it render the animal, for the time, unfit for service; as, for instance, a cough which, for the present, renders it less useful, and may ultimately prove fatal. Any infirmity which renders a horse less fit for present use and convenience, is unsoundness."

In *Garment v. Barrs*, 2 Esp. 673, which was *assumpsit* on a warranty of the soundness of a horse sold by the defendant to the plaintiff, Eyre, C. J., lays down a somewhat different rule. He says: "A horse laboring under a temporary injury or hurt, which is capable of being speedily cured or removed, is not for that cause an unsound horse; and when a warranty is made that such a horse is sound, it is made without any view to such injury; nor is a horse so circumstanced an unsound horse, within the meaning of the warranty."

In *Watson v. Denton*, 7 Car. & P. 85, it was decided, that bone-spavin in the hock was unsoundness in a horse, and a breach of warranty of soundness, although not attended with lameness at the time. But in this case the question whether bone-spavin was an unsoundness, was submitted to the jury to be determined according to the general understanding of those who enter into such contracts, upon the proofs in the case.

In *Kornegay v. White*, 10 Ala. 255, a warranty of soundness is holden to cover all diseases which affect the value of the animal sold, whether temporary or permanent. The doctrine of this case would seem to be in strict accordance with that of *Elton v. Brogden*, and *Elton v. Jordan*, *supra*. We regard the rule as enunciated by Lord Ellenborough as being the true rule upon this subject.

If a horse be afflicted with an infirmity which renders him less

fit for immediate use than he otherwise would be, and less able to perform the proper and ordinary labor of a horse, it would seem but reasonable that it should be regarded as an unsoundness, for which a party selling the horse and warranting its soundness should be held responsible. Such an infirmity may well be supposed to be the occasion of damage to the purchaser. The intention and understanding of the parties to the warranty are, in such as well as in all other contracts, to govern their construction. It is in the use of a horse that his value principally consists. It may well be presumed, then, that when a horse is purchased, he is purchased for service; and that it is with reference to his ability and fitness for service that a guaranty of soundness would ordinarily be required or given. And we can see no reason for supposing that the future fitness, or usefulness, of the horse would be likely to be more an object of solicitude on the part of the purchaser, than his present fitness. And when we consider the subject-matter of such a guaranty, we can see no reason to suppose that, in such cases, the parties do not at least intend, by a general warranty of soundness, that at the time of the sale, the animal is laboring under no disease or injury which, at the time or afterwards, does or will diminish his natural and ordinary usefulness and fitness for service. We think the construction of such a warranty, giving this effect to it, is just and reasonable, and is in accordance with the reasonable and obvious intentions of the parties.

But the defendant contends that even if the injury be temporary and curable, and do not, at the time, injuriously affect the natural usefulness and fitness of the horse for service, still it is a fault, and a breach of the warranty of soundness. We can see no ground, however, upon which to establish such a principle. It would obviously furnish a case allowing of the recovery of damages where none have been sustained. But no case has been brought to our notice by the diligent counsel for the defendant, and no case is found by us in the the books, going the extent of holding such a doctrine. And we regard the position of the defendant as being sustained neither by reason nor authority. It is, certainly, not supported by the opinion of Lord Ellenborough, and much less by that of Mr. Chief Justice Eyre.

Upon the whole, it is the opinion of the court that the rule of law given to the jury by the court below, of which complaint is made, was the true rule; and consequently, the judgment of the court is, that there must be judgment on the verdict.

WARRANTY, WHETHER IMPLIED ON SALE OF CHATTELS, AND FOR SOUND PRICE: *Moses v. Mead*, 43 Am. Dec. 676, and prior cases collected in note.

WHAT DEFECTS AMOUNT TO BREACH OF WARRANTY OF SOUNDNESS.—The sale of animals, particularly of horses, is frequently accompanied by a warranty of soundness, usually a general warranty, and it often becomes necessary to determine what defects constitute a breach of this warranty.

GENERAL RULE.—It was formerly a matter of considerable perplexity and difference of judicial opinion whether or not a temporary disease was, during its existence, a breach of a warranty of soundness. Thus in *Garment v. Barre*, 2 Esp. 673, where a mare sold was lame in one leg, caused by taking up a nail at the farrier's, Eyre, C. J., said: "A horse laboring under a temporary injury or hurt, which is capable of being speedily cured or removed, is not for that an unsound horse; and where a warranty is made that such a horse is sound, it is made without any view to such an injury; nor is a horse so circumstanced an unsound horse within the meaning of the warranty." Again, in *Bolden v. Brogden*, 2 Moo. & R. 113, the horse sold had, at the time of the sale, a slight cold or cough, and he was consequently allowed to remain in the stable a few days, but he became worse, and remained very ill and unfit for work several days longer, laboring under "influenza" or "distemper;" he had, however, completely recovered long before the trial. Colaridge, J., told the jury that the question they had to decide was, whether the horse, at the time of the sale, had upon him any disease which was calculated permanently to render him unfit for use, or permanently diminish his usefulness. "A mere slight cold no more constituted unsoundness in a horse than it did in a human creature; neither was a horse lame, within the meaning of a warranty, because, at the time of the sale, he might have a thorn in his foot, and so limp, if it were clear that the limping would be cured by simply extracting the thorn. The point to consider was the effect on the constitution of the animal." And in *Onslow v. Eames*, 2 Stark. 81, where roaring was held to constitute unsoundness in a horse, Lord Ellenborough used the following language: "If a horse be affected by any malady which renders him less serviceable for a permanency, I have no doubt that it is an unsoundness." But in *Elton v. Brogden*, 4 Camp. 281, the horse was proved to be lame at the time of the sale; the defendant, allowing this, undertook to prove that the lameness was of a temporary nature, and that the horse had afterwards recovered. In this case, Lord Ellenborough said: "I have always held, and now hold, that a warranty of soundness is broken, if the animal, at the time of the sale, had any infirmity upon him which rendered him less fit for present service. It is not necessary that the disorder should be permanent or incurable. While a horse has a cough, I say he is unsound, although that may either be temporary or may prove mortal. The horse in question having been lame at the time of the sale, when he was warranted to be sound, his condition subsequently is no defense to the action." See also, to the same effect, *Elton v. Jordan*, 1 Stark. 127; and *Coates v. Stephens*, 2 Moo. & R. 157, per Parke, B. A cough of a permanent nature is an unsoundness, no proof having been given of its discontinuance, and a verdict for the defendant in an action on a warranty is wrong, though the horse had the next day after the warranty been ridden a-hunting, thereby aggravating the cough: *Shillitoe v. Claridge*, 2 Chit. 425. And a warranty of soundness on the sale of a horse is broken by a malformation existing from its birth, which at the time of the sale, renders it less fit for reasonable use; as an extraordinary convexity of the cornea of the eye, producing short-sightedness, in consequence of which the horse is liable to shy: *Holliday v. Morgan*, 1 El. & El. 1.

The law in England on this question has, however, been settled by *Kiddell v. Burnard*, 9 Mee. & W. 668, in which a verdict had been given in favor of the plaintiff, who had purchased, with a warranty of soundness, three bullocks. Erskine, J., on the trial, told the jury that, in order to entitle the plaintiff to recover, he must show that at the time of the sale the beasts had some disease, or the seeds of some disease, in them, which would render them unfit, or in some degree less fit, for the ordinary use to which they would be applied. Parke, B., said on a motion for a new trial: "The rule I laid down in *Coates v. Stephens* is correctly reported; and I am there stated to have said: 'I have always considered that a man who buys a horse warranted sound must be taken as buying him for immediate use, and has a right to expect one capable of that use, and of being immediately put to any fair work the owner chooses. The rule as to unsoundness is, that if at the time of the sale the horse has any disease, which either actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description, or which in its ordinary progress will diminish the natural usefulness of the animal; or if the horse has, either from disease or accident, undergone any alteration of structure, that either actually does at the time, or in its ordinary effects will, diminish the natural usefulness of the horse, such horse is unsound. If the cough actually existed at the time of the sale as a disease, so as actually to diminish the natural usefulness of the horse at that time, and to make him less capable of immediate work, he was then unsound; or if you think the cough, which in fact did afterwards diminish the usefulness of the horse, existed at all at the time of the sale, you will find for the plaintiff. I am not now delivering an opinion formed on the moment on a new subject; it is the result of a full previous consideration.' That is the rule I have always adopted and acted on in cases of unsoundness, although, in so doing, I differ from the contrary doctrine laid down by my brother Coleridge in the case of *Bolden v. Brogden*, which has been referred to. I think the word 'sound' means what it expresses, namely, that the animal is sound and free from disease at the time he is warranted to be sound." The rule as laid down by American courts is undoubtedly in conformity with that given in *Kiddell v. Burnard*, *supra*. Thus it was held in *Kornegay v. White*, 10 Ala. 255, that a warranty of soundness of a slave covers all diseases, whether temporary or permanent, which affect his value; and where a slave was diseased in the knees, it was held that instructions that he should be afflicted with an incurable disease to constitute unsoundness were well refused: *Thompson v. Bertrand*, 23 Ark. 730. In *Springstead v. Lawson*, 23 How. Pr. 302, a charge to the jury that if they found that the horse, at the time of the sale, had a mere cold, controllable by ordinary remedies, it was not such an unsoundness as to constitute a breach of a general warranty of soundness, was held correct, if the judge thereby intended to say that if the horse had a mere common cold, not affecting his general health or his use, the plaintiff could not recover. And in *Burton v. Young*, 5 Harr. (Del.) 233, the following language is used by the court: "Any disease, infirmity, or defect, which renders the horse less fit for present use and convenience, and not openly and palpably visible, and which is discoverable only by persons of skill and judgment in regard to the qualities of horses, constitutes unsoundness." It was also held in *Brown v. Bigelow*, 10 Allen, 242, that lameness, when chronic and permanent, arising from causes beyond the reach of ordinary remedies, will clearly be a case of unsoundness, though it would not be a breach of a warranty of soundness, if it was accidental and temporary. It will therefore be seen from the foregoing that the doctrine of the principal case in regard to defects, temporary and

permanent, constituting unsoundness, is sustained in all its length and breadth, and would seem to be correctly formulated as follows: Unsoundness exists, and consequently a breach of warranty of soundness, when there is a permanent defect or injury, and also when such defect or injury is temporary, but the animal is thereby rendered unfit for present use; but if the defect or injury is temporary and curable, and the animal is not thereby injured for immediate service, the warranty of soundness is not broken.

TIME OF EXISTENCE OF DEFECTS.—It will be observed that many of the foregoing decisions qualify the rule of unsoundness by stating that the defects must exist at the time of the warranty, and this has been directly so held: *Bowman v. Clemmer*, 50 Ind. 10; *Miller v. McDonald*, 13 Wis. 673; and see *Merrick v. Bradley*, 19 Md. 50. In questions of unsoundness, where the disease is chronic, it is unnecessary to show that the symptoms existed at the time of the sale, for subsequent incidents and appearances may show that the disease had existed at a previous time, although the symptoms had not been observed; so held with reference to a slave afflicted with rheumatism: *Crouch v. Culbreath*, 11 Rich. 9; but in *Stephens v. Chappell*, 3 Strobb. 80, where a slave sold was taken sick with typhoid fever, it was laid down "that unsoundness consisted in some organic disease in a formed state, evidenced by symptoms, or some clearly contagious disease, such as measles or small-pox, the infection of which existed at the time of the sale;" therefore it was held that the question was correctly put to the jury whether the negro had the fever *at the time of the sale*, and the inquiry proposed to be made of physicians as to how long the disease had existed in its incipient state was properly refused as irrelevant to the issue. The ruling of the court below, however, which was intended to be affirmed, was that "such a thing as typhoid fever being considered, like small-pox, as having a beginning before the symptoms are discovered, cannot be," and that "the disease must be in a formed state, evidenced by symptoms, before it could affect the sale." The court in *Crouch v. Culbreath*, *supra*, in commenting upon this case, say that the rule thus given by the lower court extends to all cases of fever having no fixed law for their commencement, but was never intended to apply to chronic cases. The distinction made in *Stephens v. Chappell*, *supra*, as regards contagious diseases, was observed in *Woodbury v. Robbins*, 10 Cush. 520, where it was held that a horse having the seeds of the disease of glanders in him when sold is unsound, although it may be some time before the disease becomes fully developed—glanders being a contagious disease. In *Jolliff v. Bendell*, Ry. & M. 136, certain sheep, apparently healthy and sound in every respect, were sold with a warranty of soundness; but two months afterward a great part of them died. There was nothing to connect the disease of which they died with their previous condition, but it was in the opinion of farmers and breeders, an hereditary disease called the "goggles," and incapable of discovery until its fatal appearance; held, that this disease was an unsoundness existing at the time of the sale, the jury being of the opinion that it so existed; it being left to them to say "whether at the time of the sale the sheep had existing in their blood or constitution the disease of which they afterwards died, or whether it had arisen from any subsequent cause." And where a slave at the time of the sale was not free from the effects of an attack of scarlet fever which he had recently had before the sale, and by exposure in traveling before the sale, the incipient stage of consumption, of which he subsequently died, intervened, it was held that it was a breach of warranty of soundness if the slave was at the time of the sale laboring under a disease which was not then developed, but of which he afterwards died, or which

conduced to or resulted in another disease which afterwards proved mortal: *Fondren v. Durfree*, 39 Miss. 324. A prior case in the same state—that of *Shewalter v. Ford*, 34 Id. 417, where a slave purchased was suffering from bronchitis at the time of the sale, afterwards terminating in pneumonia—thus lays down the rule: “It is not necessary to constitute a breach of warranty of soundness that the slave be laboring at the time of the warranty under the disease which afterwards proves mortal; but it is sufficient to render a party liable upon his warranty, if the slave be at the time laboring under a disease, which, though not mortal in its character, is a specific disease, and conduces to and results in a disease that proves mortal.” Nor would it be necessary that the disease existing at the time of the sale should prove mortal, in order to create a liability on the warranty; it is enough that the purchaser is compelled to sustain loss or incur expense to a partial extent by reason of the unsoundness: *Id.*

PARTICULAR DEFECTS CONSTITUTING UNSOUNDNESS.—In *Dickinson v. Follett*, 1 Moo. & R. 299, Alderson, J., in summing up, said that a horse could not be considered unsound in law merely from badness of shape; as long as he was uninjured, he must be considered sound; but when the injury is produced by the badness of his action, that injury constitutes unsoundness; and see *Brown v. Elkington*, 8 Mee. & W. 182. Broken-wind in horses is an unsoundness: *Willan v. Carter*, cited Oliph. Law of Horses, 3d ed., 74. A new trial was refused where the plaintiff had obtained a verdict in an action on a warranty of soundness, on the ground that the horse was chest-fundered, the defendant producing on the application an affidavit that there was no such disease known to constitute an unsoundness, and stating that he was taken by surprise: *Atterbury v. Fairmanner*, 8 Moo. 32. A cough or cold, at the time of the sale, may be a breach of a warranty of soundness: *Coates v. Stephens*, 2 Moo. & R. 157; *Elton v. Brogden*, 1 Stark. 127; *Springstead v. Lawson*, 23 How. Pr. 302; and see *Shewalter v. Ford*, 34 Miss. 447; *contra: Bolden v. Brogden*, 2 Moo. & R. 113; see these cases considered *supra*. There is some apparent if not real conflict of opinion on the question whether “crib-biting” in horses is an unsoundness; in *Hunt v. Gray*, 35 N. J. L. 227, it was said to be doubtful, some of the English decisions holding it to be a vice and not an unsoundness; and in *Walker v. Hoisington*, 43 Vt. 608, where a horse was warranted “sound and right,” it was held that perhaps the horse was physically sound, although a cribber, and perhaps not, and as to that the court would make no decision and express no opinion, but the warranty was more than soundness, and meant that the horse was right in conduct and behavior as to all matters materially affecting its value, as well as physical condition. So also in *Paul v. Hardwick*, 1 Chit. Con., 11th Am. ed., 655, Oliph. Law of Horses, 81, some of the most eminent veterinary surgeons gave evidence that crib-biting was, in their opinion, at all events a vice within the meaning of a warranty that a horse was “free from vice,” and the plaintiff had a verdict on that ground. In *Brannenburgh v. Haycock*, Holt N. P. 630, crib-biting was held not to be unsoundness, and therefore not included in a general warranty of soundness, the court saying: “It is a curable vice in its first stages, and this horse was only proved to be an incipient crib-biter;” and in *Scholefield v. Robb*, 2 Moo. & R. 210, it was held that crib-biting, which has not yet produced disease or alteration of structure, is not an unsoundness, but is a vice, under a warranty that a horse is “sound” and free from “vice;” but cribbing, if affecting the health and condition of a horse so as to render him less able to perform service, and of less value, is unsoundness: *Washburn v. Cuddihy*, 8 Gray, 430. This latter decision would seem to

express the true rule, and it is evidently in harmony with the two last preceding cases.

Various diseases of the eye have been held to be unsoundness. In *Holliday v. Morgan*, 1 El. & El. 1, it was held that an extraordinary convexity of the cornea of the eye, producing short-sightedness, in consequence of which the horse was liable to shy, was a breach of a warranty of soundness; and such a defect is not so patent that a purchaser with express warranty is bound to notice it. And a recovery on a promissory note given for the price of a slave was set aside as contrary to the evidence, the defendant alleging a breach of a warranty of soundness, and the evidence showing that a protruded eye was not merely a deformity, but was caused by an indolent tumor, liable to destroy the eye and perhaps prove fatal, for in finding the full amount of the note, the jury must have found that the eye was not diseased at the time of the warranty: *Hook v. Stovall*, 21 Ga. 69. Cataract is an unsoundness: *Higgs v. Thrale*, cited Oliph. Law of Horses, 71; as is also the disease known as glaucoma: *Settle v. Garner*, Id. 86. Want of an eye was held to be a breach of warranty of soundness, in *Butterfield v. Burroughs*, 1 Salk. 211; but *quære*, whether this is not a patent defect not covered by a warranty: See *Burton v. Young*, 5 Harr. (Del.) 233; *Bayley v. Merrell*, Cro. Eliz. 389.

Various diseases of the feet and limbs of horses have also been held to constitute unsoundness. Thus, bone-spavin in the hock is unsoundness, whether it produces lameness apparent at the time of the warranty or not, and though it may not produce lameness for years after: *Watson v. Denton*, 6 Car. & P. 85. A horse afflicted with the navicular disease is unsound: *Huston v. Plato*, 3 Col. 402; *Matthews v. Parker*, Oliph. Law of Horses, 447, app.; and see *Bywater v. Richardson*, 1 Ad. & El. 508. Ossification of the cartilages is an unsoundness: *Simpson v. Potts*, Oliph. Law of Horses, 443, app.; and as to laminitis, see *Smart v. Allison*, Id. 450; *Hall v. Rogerson*, Id. 444; and see the remarks of Alderson, B., in the last case on inflammation of the foot and cracked heels. In *Margetson v. Wright*, 7 Bing. 603, S. C., 5 Moo. & P. 606, a race-horse which had broken down in training, was a crib-biter, and had a splint on a fore leg, was sold after a disclosure of these defects, the defendant refusing to give a warranty that the horse would stand training, and to sign a warranty that he was sound, "wind and limb," unless the words "at this time" were added. The horse broke down in training several months afterwards, and an action was brought on the warranty. Parke, J., told the jury that the insertion of the words "at this time" were probably intended to exclude a warranty of the horse's standing training, and then stated the question to be, whether at the time of the warranty the animal was sound for the purposes of an ordinary horse; the express warranty rendering the defendant responsible for the consequences of the splint, though the defect was visible. On a motion for a new trial, the latter instruction was held erroneous, Tindal, C. J., saying that the direction would have been less subject to misapprehension if the jury had been left to consider whether the horse was, at the time of the bargain, sound, wind and limb, saving those manifest defects contemplated by the parties. The defendant on the subsequent trial, 8 Bing. 454, S. C., 1 Moo. & S. 622, was held liable on his warranty, the plaintiff proving that there were two kinds of splints, some of which cause lameness, and that others do not, and a splint was therefore not one of those patent defects against which a warranty is inoperative. This latter case was followed in *Smith v. O'Bryan*, 11 L. T., N. S., 346, where it was sought to set aside a verdict for the plaintiff on a warranty of soundness. The horse

had a splint which was shown to the plaintiff, and afterwards a general warranty was given: *Held*, since some splints cause lameness and others not, a splint was not one of those patent defects against which a warranty is inoperative. The reporter in a note to *Bassett v. Collis*, 2 Camp. 524, queries thrushes, splints, and quidding as being unsoundness in horses, saying: "There have been several trials lately in which it was debated whether these constitute unsoundness; but the opinions of the farriers and veterinary surgeons examined were so contradictory that it was impossible for the court to lay down any general rule upon the subject." Temporary lameness may be unsoundness: *Elton v. Brogden*, 4 Id. 281; *Elton v. Jordan*, 1 Stark. 127; and see *Coates v. Stephens*, 2 Moo. & R. 157; *Kiddell v. Burnard*, 9 Mee. & W. 668. And a nerved horse is unsound: *Best v. Osborne*, Ry. & M. 290. But "curby hocks" is not an unsoundness: *Brown v. Elkington*, 8 Mee. & W. 132; and the mere fact that a horse is thin-soled at the time of the sale is no breach of a warranty of soundness, unless the peculiar formation had produced at that time actual lameness: *Bailey v. Forrest*, 2 Car. & Kir. 131.

The fact that a mare, sold for livery purposes, is with foal was held not to be unsoundness within the meaning of a general warranty, in *Whitney v. Taylor*, 54 Barb. 536. "It was in no sense of the word to be regarded as an unsoundness, although it rendered the mare less valuable for livery purposes, for a time at least." A horse having the glanders is plainly unsound: *Woodbury v. Robbins*, 10 Cush. 520; and goggles in sheep is an unsoundness: *Joliff v. Bendell*, Ry. & M. 136; so with lung disease: See *Hyde v. Davis*, Oliph. Law of Horses, 453, app.; *Buckingham v. Rogers*, Id. 455, app.; and see *Fondren v. Durfee*, 39 Miss. 324; *Shewalter v. Ford*, 34 Id. 447; and as to thick wind in horses constituting unsoundness, see *Atkinson v. Horridye*, Oliph. Law of Horses, 448, app. In *Onslow v. Hames*, 2 Stark. 81, roaring was held to constitute an unsoundness in a horse, Lord Ellenborough saying: "If a horse be affected by any malady which renders him less serviceable for a permanency, I have no doubt that it is an unsoundness; I do not go by the noise, but by the disorder;" but in the previous case of *Bassett v. Collis*, 2 Camp. 525, it was held that roaring was not necessarily unsoundness, the same distinguished jurist saying: "If the horse emits a loud noise, which is offensive to the ear, merely from a bad habit which he has contracted, or from any cause which does not interfere with his general health or muscular powers, he is still to be considered a sound horse. On the other hand, if the roaring proceeds from any disease or organic infirmity which renders him incapable of performing the usual functions of a horse, then it does constitute unsoundness. The plaintiff has not done enough in showing that this horse was a roarer. To prove a breach of warranty, he must go on and show that the roaring was symptomatic of disease." It was held in *Tatum v. Mohr*, 21 Ark. 349, that if a slave sold was unsound in body, the plaintiff would be entitled to recover on a warranty of soundness, though the slave's mind was unaffected by the disease. A warranty of soundness of a slave includes soundness of mind as well as body: *Simpson v. McKay*, 12 Ired. 141; and a warranty of soundness of the "person" of a slave includes a warranty of soundness of mind: *Caldwell v. Wallace*, 4 Stew. & P. 282; but a warranty of a slave "to be healthy" does not extend to a warranty of soundness of mind, but of body only: *Nelson v. Biggers*, 6 Ga. 205. See further, on this subject of particular defects, Oliph. Law of Horses, c. 4.

PATENT DEFECTS.—A general warranty of soundness, no more than any other general warranty, does not usually extend to defects apparent on simple inspection, requiring no skill to discover them, nor to defects known to the

buyer: See Benj. on Sales, sec. 616; *Huston v. Plato*, 3 Col. 402; *Williams v. Vance*, Dudley, 97; *Dean v. Morey*, 33 Iowa, 120; and see *Pres. of Connersville v. Wadleigh*, 41 Am. Dec. 214, and note. But patent defects may be covered by a warranty, if the warranty be so expressed. Thus in *Liddard v. Kain*, 9 Moo. 356, S. C., 2 Bing. 183, the seller informed the buyer that one of two horses he was about to sell him had a cold, but he agreed to deliver both horses at the end of a fortnight "sound and free from blemish;" and at the end of that time the horses were both delivered, but the cough on the one still continued, and the other had a swollen leg and was lame from a kick he had received in the stable. On a verdict being found for the defendant in an action by the seller for the price, a new trial, on the ground that the defects were patent, was refused, since the warranty did not apply at the time of the sale, but to a subsequent period. And in *Pinney v. Andrus*, 41 Vt. 631, it was held that the plaintiff having alleged a special warranty against the foot-rot in sheep, and as a breach, that the sheep had the foot-rot, is entitled to recover, upon proof of the breach, without regard to whether the existence of the disease was obvious and discoverable, or was discovered and known by the plaintiff when he made the purchase; and see *Margetson v. Wright*, *supra*. But where a slave was diseased in the knees, although the purchaser might have discovered the defect by having him stripped, he was not bound to do so, but might rely upon his warranty: *Thompson v. Bertrand*, 23 Ark. 730; and the rule does not extend to a case where, although the purchaser has notice of some defect, its character and extent are not definite and certain and obvious to the senses: *Shewalter v. Ford*, 34 Miss. 447; *Venning v. Gantt*, Cheves, 87; *Furman v. Miller*, 2 Brev. 127.

UN SOUNDNESS, WHETHER QUESTION OF FACT OR OF LAW.—The soundness or unsoundness of an animal is a question peculiarly fit for the consideration of a jury, and the court will not set aside a verdict for a preponderance of evidence: *Lewis v. Peake*, 7 Taunt. 153; S. C., 2 Marsh. 431. In *Alexander v. Dutton*, 58 N. H. 282, the defendant contended that, as a matter of law, corns in a horse's feet did not constitute unsoundness: *Held*, that this could not be sustained, but that the question was one of fact, to be determined by the evidence and the general legal definition of unsoundness. "The law gives a general definition of unsoundness, and leaves it to the trier of the facts to find whether the infirmity of corns, in a particular case, is within the legal definition of unsoundness; whether that defect materially diminishes the value of the horse and his ability to perform service. Such diminution of value and ability is an unsoundness, although it may be temporary and curable"—citing the principal case.

In an action on a warranty of a horse, the plaintiff must positively prove that the horse was unsound; it is not sufficient for him to give such evidence as to induce a suspicion of unsoundness: *Haves v. Dixon*, 2 Taunt. 343.

STATE v. CARR.

[21 NEW HAMPSHIRE, 166.]

REQUIREMENTS FOR GRANTING NEW TRIAL FOR NEWLY DISCOVERED EVIDENCE ARE: 1. The evidence must be new, such as had no existence at the former trial, or its existence was not then known; 2. It must be material to the issue, going to the merits of the case, and not to discredit or impeach a former witness; 3. Reasonable diligence must have been used,

both to discover and procure the evidence; 4. The evidence must not be cumulative.

NEW TRIAL WILL NOT BE GRANTED FOR NEWLY DISCOVERED EVIDENCE, where, after conviction of perjury, affidavit is made that a material witness for the prosecution, after his examination, expressed hostile feelings towards the prisoner; such evidence going only to discredit or impeach the witness.

INDICTMENT for perjury. One Barden, whose testimony was material to the issue, was a witness for the prosecution. The respondent, after verdict in favor of the state, moved in arrest of judgment, and for a new trial, on account of newly discovered evidence, furnishing in support of the motion the following affidavit of one Webster: "During the trial of Nathan Carr, I was in the town hall, where the court was being held. I was sitting near one of the witnesses, W. Wallace Barden, and remarked to him that I would not be in the situation in which his brother John and Benjamin Tuttle, jun., had placed themselves for all the property in the state of New Hampshire. He said, 'Damn him, I would; if there is anything I can do to get him into state's prison, I shall do it; and my testimony sustained my brother.' He said, 'I own a farm in Hillsborough, and if we cannot get the damned curse into state's prison, and he goes back there, I will sell my farm if I cannot get half it is worth.' I communicated this fact to General Pierce for the first time this morning, after the jury returned their verdict."

Ayer, county solicitor, for the state.

D. Clark and Pierce, for the respondent.

By Court, EASTMAN, J. It is not often that a question of the kind raised by the case before us arises in the practice of the courts of this state. The right of review, by which the losing party, on issue joined in a civil suit, may, on certain conditions, again try his case, after being once defeated, being given by the statutes of this state, the many questions, which have arisen in other jurisdictions where this right does not exist, have not been considered here. Parties who are defeated on the facts generally resort to their statutory rights for a rehearing, and seldom apply to the court for relief under such circumstances. But in criminal cases no such right exists; and consequently whenever a case occurs where evidence is discovered after the trial, which the prisoner may deem important to his defense, it becomes the duty of the court to entertain a motion for a new trial, based upon affidavits of the existence of such evidence. Yet the vigilance of

friends and counsel, and the aid given by the state in capital cases, in procuring all evidence that is supposed to exist, and the disposition of the court to afford all proper lenity, by deferring and continuing the trial of criminal cases, for the procurement of evidence, whenever they are satisfied that any exists, makes it seldom necessary for motions like the present to be made.

In many jurisdictions the subject has been repeatedly and fully considered; and among them there appears to be very little, if any, diversity of opinion in regard to it. The doctrine of the courts of England, and of this country generally, is substantially the same. A few exceptions only, and those arising out of the peculiar circumstances of each case, are to be found. The following general principles are clearly deducible from the authorities, and may be laid down as well-established law; 1. The evidence must be new; such as was not used on the former trial; such as either had no existence at the former trial, or the party did not at the time of the trial know was in existence. And this point, the ignorance of the party as to the existence of the evidence, as it lies at the foundation of the application, must be made clearly to appear. 2. It must be material to the issue joined; material to the point to be decided by the verdict, and not collateral. It must go to the merits of the case, and not to discredit or impeach a former witness. 3. It must appear that the party has used all reasonable diligence; that he has been vigilant in seeking both to discover and to procure the evidence. 4. It must not be cumulative. In most of the decisions upon motions of this kind, these general positions are discussed and decided, although the precise point raised in each case may not require a decision of the whole. Among the numerous cases to be found upon the subject we cite the following: *Anonymous*, 6 Mod. 222; *Watson v. Sutton*, 12 Id. 584; *King v. Teal*, 11 East, 311; *Halsey v. Watson*, 1 Cai. 24; *Vandervoort v. Columbia Ins. Co.*, 2 Id. 155; *Smith v. Brush*, 8 Johns. 84; *Pike v. Evans*, 15 Id. 210; *Porter v. Talcott*, 1 Cow. 359; *People v. Superior Court of New York*, 10 Wend. 285; *Harrington v. Bigelow*, 2 Denio, 109; *Brisbane v. Adams*, 1 Sandf. 195; *Commonwealth v. Murray*, 2 Ashm. 41; *Commonwealth v. Williams*, Id. 69; *Moore v. Philadelphia Bank*, 5 Serg. & R. 41; *Warren v. Hope*, 6 Me. 479; *Daniel v. Daniel*, 2 J. J. Marsh. 52; *Ewing v. Price*, 3 Id. 520; *Roberts v. State*, 3 Ga. 310; *Irwin v. Jordan*, 7 Humph. 167; *Sheppard v. Sheppard*, 5 Halst. 250.

In New York, and perhaps elsewhere, a few cases may be

found which, at first, would seem not to come fully up to the positions above laid down. But an examination of them, as reported at length, will show that they do not impair the general doctrine. *Rowley v. Kinney*, 14 Johns. 186, and *Jackson v. Hooker*, 5 Cow. 207, are among them. This class of cases relates to "military lots." In the first case, the court say: "As a general rule, we should refuse granting new trials on the grounds furnished. We have, however, repeatedly, in trials concerning military lots, been more liberal in granting new trials, owing to the obscurity and multifarious frauds attending upon those titles, and especially when the question turns upon the identity of the soldier from whom the title is claimed to be derived." In the other case, the court remarks: "This class of cases is considered peculiar, and as exempt from the ordinary rules in relation to granting new trials."

Applying the general principles, above laid down, to the case under consideration, we find that the facts set forth in the affidavit upon which the motion for a new trial is predicated, do not come within any principle recognized as a sufficient cause for setting aside a verdict. In the first place, it does not appear that the evidence is new, or that Carr had not, at the time of the trial, full knowledge of Barden's feelings toward him. Webster swears that Barden communicated to him his hostility towards Carr during the trial, and that he made it known to Carr's counsel for the first time after the verdict was returned. But this falls far short of showing that Carr himself did not previously know it. For aught that appears, he may have been well apprised of Barden's feelings before the trial took place; for, if we are to credit the statement of Webster, Barden did not attempt to make any secret of his feelings. The affidavit shows Barden's hostility, and that it was not communicated to Carr's counsel till after the trial. But it goes no further. It negatives in no way Carr's knowledge. He may not have known it; but we cannot draw any inference from the affidavit that he did not. All doubt on this point should be excluded; for the very foundation of setting aside a verdict for newly discovered evidence rests upon the basis that the evidence is new; that it was not known to the party till after the trial.

According to some very respectable authorities, even if he did not know it, his ignorance of the fact manifested a want of diligence in ascertaining it, which a court would not overlook; it should have been ascertained when Barden was on the stand. In *Wright v. Alexander*, 11 Smed. & M. 411, it was

held not to be good ground for a new trial, that the defendant had discovered that he could have proved the payment of the note sued on, by a witness used on the trial; that, by due diligence, he could have obtained the knowledge before the trial; or by proper interrogatories, have established the fact at the trial. And in *Fanning v. McCraney*, Morr. 398, it is laid down as a general rule, that where newly discovered evidence is expected to be proved by a witness who was called and examined, no new trial will be granted; as the extent of the witness's knowledge should be ascertained when on the stand. To these cases may be added, *Bell v. Thompson*, 2 Chit. 194; *Vandervoort v. Columbian Ins. Co.*, 2 Cai. 155; *Commonwealth v. Benesh*, Thach. Cr. Cas. 684; *Bennett v. Commonwealth*, 8 Leigh, 745; *People v. Vermilyea*, 7 Cow. 369.

But it is not necessary to place our decision upon this ground; since we might, were this the only point in the case, continue the action, and permit the respondent to establish this fact in his favor, if he could. Assuming, therefore, that Barden entertained feelings of hostility towards Carr, and that Carr was not apprised of it till after the trial, is the character of this new evidence such as to warrant the setting aside of this verdict? The evidence is this: one of the witnesses who testified against Carr entertained at the time hostile feelings towards him, and that fact did not appear to the jury. The issue to be tried was, whether Carr had been guilty of perjury or not. Now, although it was competent for the prisoner to make it appear to the jury that Barden's feelings were hostile towards him, and thereby, perhaps, lessen the weight of his testimony with the jury, yet the hostility of Barden was not the issue to be tried. His feelings towards Carr were not the point to be settled. And the authorities are very decided, that such is not that kind of material evidence, upon the discovery of which a new trial can be granted; that a new trial will not be granted on account of newly discovered evidence to discredit or impeach a witness. Most of the authorities above cited apply directly to this point. A few others may be added: *Ford v. Tilly*, 2 Salk. 653; *George v. Pierce*, 7 Mod. 31; *Bartlett v. Pickersgill*, 4 East, 577, note to *King v. Boston*; *Thurtell v. Beaumont*, 1 Bing. 339; *Duryee v. Dennison*, 5 Johns. 248; *Bunn v. Hoyt*, 3 Id. 255; *Shumway v. Fowler*, 4 Id. 425; *Commonwealth v. Drew*, 4 Mass. 399; *Commonwealth v. Waite*, 5 Id. 261; *Hammond v. Wadhams*, Id. 853; *Lloyd v. Monpoe*y, 2 Nott & M. 446; *Robins v. Fowler*, 2 Ark. 133; *Great Falls Mfg. Co. v. Mathes*, 5 N. H. 574.

New trials will be granted for misconduct in the prevailing party; for mistake or error in the admission or rejection of evidence; for irregularity in the conduct of the jury; for error in the instructions given by the court; and for newly discovered evidence, where a proper case is made out. But in deciding motions for new trials, on account of newly discovered evidence, courts have found it necessary to apply somewhat stringent rules to prevent the almost endless mischief which a different course would produce. Careless preparation, tampering with witnesses, repeated and fruitless trials, and immense expense in litigation would be a few of the many evils attendant upon a loose practice in this respect. In cases of magnitude and interest, many witnesses unconsciously contract more or less feeling. Others, from various causes, may entertain hostility from the beginning. This a party may suspect; but supposing that a cross-examination on the point would not aid him with the jury, he lets it pass. If he loses his verdict, he then seeks to ascertain the fact; and having ascertained it, procures his new trial. In criminal cases, the occurrence would, in all probability, be still more frequent; especially should the prosecution be against a person of wealth or previous good standing, or where those in the vicinity have contracted prejudices, either for or against the prisoner, and consequently took a deep interest in the result. It would also put it in the power of an unwilling witness for the government to give the prisoner a new trial almost invariably; for, after an unfavorable verdict, he has but to express, in the presence of some one, feelings indicating enmity, and the verdict would be set aside. Courts, therefore, feel themselves bound to hold the rules granting new trials for newly discovered evidence with strictness; but at the same time, to award them, whenever they become satisfied that the ends of justice require that they should be had.

In the present case, the facts presented not coming within any of the principles upon which new trials can be granted, there must be judgment on the verdict.

NEWLY DISCOVERED EVIDENCE AS GROUND FOR NEW TRIAL.—The evidence must have been discovered since the trial: *Myers v. Brownell*, 16 Am. Dec. 729. A new trial will not be granted when the person by whom the evidence is to be given was one of the principal witnesses on the trial, and it is not shown that the party or his other counsel were ignorant of the fact: *Lowry v. Erwin*, 39 Id. 556. The evidence must be material to the issue: *Schlenker v. Risley*, 38 Id. 100; *Myers v. Brownell*, *supra*. In *McIntire v. Young*, 39 Id. 443, it was said that new trials are rarely, if ever, granted on

the ground of newly discovered evidence where the object is to impeach the character of a witness; and see *Peagram v. King*, 11 Id. 794; but in the latter case, while this principle was recognized, it was held that equity would grant a new trial at law, upon newly discovered proof of the perjury of the witness, upon whose testimony the former verdict was obtained, where such proof was discovered too late to obtain redress at law. Reasonable diligence must have been used to obtain the evidence: *Schlencker v. Risley*, *Myers v. Brownell*, *McIntire v. Young*, *supra*; *Howard v. Grover*, 49 Id. 478. A bill in equity, on demurrer, was held to lie, where it averred that due diligence had been used without effect to obtain the evidence at the trial: *Deputy v. Tobias*, 12 Id. 243. The evidence must not be cumulative: *Gardner v. Mitchell*, 17 Id. 349; *Whitbeck v. Whitbeck*, 18 Id. 503; *Smith v. Shultz*, 32 Id. 33; *Schlencker v. Risley*, 38 Id. 100; *Perrin v. Protective Ins. Co.*, Id. 728; *State v. Hornsby*, 41 Id. 305. In *Myers v. Brownell*, *supra*, however, while it was admitted that the evidence must not in general be cumulative, it was held that such evidence, removing all doubt upon a material point before doubtful, and making it apparent that injustice had been done, will warrant granting a new trial. A new trial will not be granted unless the newly discovered evidence would be admissible under the pleadings as they existed prior to the rendition of the judgment, without further amendment: *Landry v. Baugnon*, 36 Id. 606. In South Carolina, a new trial will not be granted because of the discovery of oral testimony: *Ecfert v. Des Coudres*, 12 Id. 609, and note. As to when and how a new trial at law is obtainable in equity, see note to *Oller v. Pray*, 19 Id. 609. Affidavit of newly discovered evidence, what must state: See *Forester v. Guard*, 12 Id. 141, and note.

HERSOM v. HENDERSON.

[21 NEW HAMPSHIRE, 224.]

VERBAL CONTRACT MAY BE PROVED, although the parties have made a written contract at the same time touching the same subject, if it does not contradict or vary the writing.

PAROL EVIDENCE IS ADMISSIBLE TO PROVE CONTRACT OF WARRANTY not contained in a bill of sale and receipt.

ASSUMPSIT on a warranty of a horse. The plaintiffs, who were partners under the name of Isaac Hersom, purchased two horses of the defendant. Their evidence tended to show that when the defendant was asked if the horses were sound and kind in every way, he answered, "Yes, they are;" one of the animals, however, was subject to fits, and the defendant knew of this fact. The plaintiffs, on notice from the defendant, produced a paper which read as follows: "Mr. Isaac Hersom bo't of Charles Henderson, one brown horse, eight years old this spring; one bay mare, eight years old this spring. Received payment, \$250. Charles Henderson." The defendant, having moved for a nonsuit, the court held that the writing must be presumed to contain the contract between the parties, and that parol evidence was not admissible to prove a contract of war-

ranty not contained in the writing. The plaintiffs excepted, and a verdict was taken for the defendant by consent, subject to the opinion of this court.

John S. Woodman, for the plaintiffs.

R. and W. A. Kimball, for the defendant.

By Court, GILCHRIST, C. J. The writing produced in evidence is a bill of sale of the horses, containing a receipt for the payment of their price. Nothing is said in it about a warranty of their soundness. The plaintiffs have proved by parol evidence, independent of the writing, and having no connection with it, that the defendant, at the time of the sale, warranted the horses to be sound. The court ruled that the writing must be presumed to contain the contract between the parties, and that parol evidence was not admissible to prove a contract of warranty not contained in the writing.

Parol evidence is not admissible to vary or control the writing; and if the evidence offered has that effect, it was properly excluded. But we think that the evidence was competent. The plaintiffs did not rely on the writing to make out their case, nor was it necessary that they should do so. The evidence of the warranty does not contradict or vary the effect of the writing in any degree. It does not even explain it; and it needs no explanation by evidence *aliunde*. The defendant proved a warranty by evidence as independent of the writing as one thing of the kind can be of another. There is no reason to presume that, because the parties made a written contract relating to the price and age of the horses, therefore they made no other contract relating to them, touching a matter perfectly consistent with the writing. There is no necessary or usual connection between the two matters, and we cannot reason from one to the other. The opinion of the court is that the ruling was erroneous; and there is an English case which justifies this conclusion. In the case of *Allen v. Pink*, 4 Mee. & W. 140, the defendant gave a verbal warranty of a horse, which the plaintiff thereupon bought and paid for, and the defendant then gave him the following memorandum: "Bought of G. P. [the defendant] a horse, for the sum of seven pounds, two shillings and sixpence. (Signed) G. P." It was held that parol evidence might, notwithstanding, be given of the warranty. Lord Abinger said, in the course of his opinion: "The general principle stated by Mr. Byles is quite true, that if there had been a parol agreement which is afterwards reduced by the parties into writing, that writing alone must be looked to, to

ascertain the terms of the contract; but the principle does not apply here. There was no evidence of any agreement by the plaintiff, that the whole contract should be reduced into writing by the defendant. The contract is first concluded by parol, and afterwards the paper is drawn up, which appears to have been meant merely as a memorandum of the transaction, or an informal receipt for the money; not as containing the terms of the contract itself."

Verdict set aside.

ADMISSIBILITY OF PAROL EVIDENCE, TO ADD TO, VARY, OR EXPLAIN CONTRACTS IN GENERAL: See *Haven v. Brown*, 22 Am. Dec. 208; *Boyle v. Agawam Canal Co.*, 33 Id. 749; *Adams v. Wilson*, 45 Id. 240, and prior decisions in this series, collected in notes to these cases: *Foley v. Cowgill*, 32 Id. 49; *Jones v. Hardesty*, Id. 180.

PAROL EVIDENCE IS ADMISSIBLE to control a receipt: *Bridge v. Gray*, 25 Am. Dec. 358, and prior cases collected in note; *Tucker v. Baldwin*, 33 Id. 384; *Brooks v. White*, 37 Id. 95; or to explain or control the consideration clause in a deed: *McCrea v. Purmort*, 30 Id. 103, and note collecting prior cases; *Beach v. Packard*, 33 Id. 185; *Groves v. Steel*, 46 Id. 551; and see *Bolton v. Johns*, 47 Id. 404; or to show enlargement of the time of performance of a written contract: *Blood v. Goodrich*, 24 Id. 121, and cases in note; *Dehazo v. Lewis*, Id. 769; or to show a deed, absolute on its face, to be a mortgage: *Moore v. Madden*, 46 Id. 298, and prior cases in note. Parol evidence may be offered by a lessee, showing that at the time of execution of a written lease, the lessor agreed to perform and insert a covenant, which was omitted in the lease: *Christ v. Diefenbach*, 7 Id. 624; it is likewise admissible to show that it was the understanding and agreement of all the parties to a lease that for the last nine months no rent should be payable: *Haltz v. Wright*, 16 Id. 575; and in *Oliver v. Oliver*, 26 Id. 123, it was held that a verbal promise, forming the consideration of the agreement, but not expressed in it, may be proved; but see the comments on these cases, in the note to *Thompson's Lessee v. Wright*, 1 Id. 257. Where a conveyance is made to a creditor, to sell the land to satisfy his claim, the creditor giving his note for the estimated balance remaining from the sale, evidence of a collateral parol agreement is admissible to show that any deficiency arising from the sale should be deducted from the amount of the note: *Lewis v. Gray*, 2 Id. 21; also, parol evidence is admissible to show the state of facts existing at the time of the conveyance, and that the land was taken subject to an incumbrance, of which the purchaser had knowledge: *Allen v. Lee*, 48 Id. 352; and to supply an omission, which, upon the face of the contract, was clearly an oversight: *Union Bank v. Meeker*, 50 Id. 559. But parol evidence is inadmissible to show that a written assignment on the back of a certificate of stock of all "right, title, and interest," was accompanied by a warranty of title: *Osgood v. Davis*, 36 Id. 708; nor is it admissible to show that a grantor did not warrant against a particular incumbrance, where the conveyance covenants against all incumbrances: *Grice v. Scarborough*, 42 Id. 391. A written contract merges antecedent declarations and negotiations: *Thompson v. Sloan*, 35 Id. 546; *Spann v. Baltzell*, 46 Id. 346; but an oral agreement, made after a written agreement, and before the breach thereof, is admissible to show a new contract, waiving, varying, or annulling the written contract: *Spann v. Baltzell*, *supra*; and see *Cummings v. Arnold*, 37 Id. 155.

THE PRINCIPAL CASE IS CITED in *Webster v. Hodgkins*, 25 N. H. 143, to the point that parol evidence of a warranty was admissible, where the entire contract was not contained in the writings; and in *Filkins v. Whyland*, 24 Barb. 380, in holding that parol evidence of a verbal warranty is admissible where a bill of sale was executed by the vendor of a horse, specifying the price and acknowledging the receipt. The principal case, as subsequently tried, is reported in *Herson v. Henderson*, 23 N. H. 498.

STATE v. WEED.

[21 NEW HAMPSHIRE, 202.]

VOID PROCESS AFFORDS NO PROTECTION TO OFFICER serving or attempting to serve it.

PROCESS MAY BE VOID AS TO PARTIES ORIGINATING AND ISSUING SAME, but voidable only as to the officer serving it.

OFFICER IS PROTECTED IN SERVICE OF PROCESS, AND PERSON RESISTING HIM IS LIABLE, notwithstanding errors or irregularities in issuing the process, where it is regular and legal in its frame, and appears to have been issued by a magistrate having jurisdiction of the subject-matter, and of the person of the respondent.

OFFICER IS NOT TO BE GOVERNED BY MOTIVES AND DESIGNS OF COMPLAINANT, in executing criminal process regular and legal upon its face, and he will be protected, although the complainant's objects are illegal, and so known to be by the officer.

OFFICER IS PROTECTED IN SERVICE OF PROCESS regular and legal upon its face, although the foundation of the complaint on which the warrant issued was false and groundless.

INDICTMENT for assaulting and obstructing Remick, a deputy sheriff, in the service of a warrant on a complaint by one Nancy Pulsifer, for assault and battery. The complaint and warrant were in due and regular form, the complaint being signed by the complainant, and the certificate of the oath and the warrant by Kimball, a justice of the peace; but after the complaint and warrant had been made out by Kimball, and the certificate of the oath and the warrant signed by him, he gave the warrant to the complainant, and sent her to Quimby, another magistrate, with directions to have his name erased, and for Quimby to administer the oath and sign the papers. The complaint was signed in Quimby's presence, and the oath administered, but Kimball's name was not erased from the papers, nor was Quimby's affixed. Remick did not know the manner in which the papers were made out, but when put into his hands they appeared to be duly executed. The respondent claimed he was justified, and offered to show that Remick knew the proceedings against Weed were to be used for the purpose of enabling the complainant and others to get the wife of Weed's

father out of her husband's possession, and not for the purpose of arresting and punishing Weed. He also offered to show that the complaint was false and groundless. All this evidence was ruled inadmissible. The jury were instructed, among other things, that if, when the warrant came into Remick's hands, the complaint, the certificate of the oath purporting to be administered to the complainant, and the warrant, were duly signed, and the papers were all fair and legal upon the face, that was sufficient. Verdict against the prisoner, and a motion by him to set the same aside, and for a new trial, for supposed error in the decisions of the court.

Sullivan, attorney-general, for the state.

Emerson and J. Eastman, for the respondent.

By Court, EASTMAN, J. It is well settled that all acts done under void process are illegal; and that a void warrant affords no protection to the officer serving or attempting to serve the same. Such is the general current of all the authorities; and they appear to be based upon sound and fixed principles. The meaning of the term "void," when applied to legal process, is, therefore, material to be considered. A process may be void, so far as the parties originating and issuing the same are concerned, while at the same time it may be a good precept for the officer serving it. A complainant and magistrate may both be liable for the issuing of a warrant erroneously and irregularly, without cause and without jurisdiction; while the officer into whose hands it is committed, finding it regular and legal upon its face, is not only protected in its service, but bound to obey it. As connected with the magistrate and party, it is a void warrant *in toto*, but in the hands of the officer, voidable only. The want of a clear distinction in this respect has occasionally led to some confusion; but when this distinction is kept in view, there is no difficulty in arriving at correct results.

A process is void as to all connected with it when upon its face it wants essential legal form and substance. A seal, for instance, being one of the legal requisites to give vitality to a process, is essential, and its absence renders the precept absolutely void: *State v. Curtis*, 1 Hayw. 471. If a warrant is issued upon a charge purporting to be based upon a certain law, and that law has been repealed or never had an existence, the warrant is void. In such a case, the process shows upon its face that it is a nullity. Or if the warrant describes no offense, or sets forth no person to be arrested, but, in attempt-

ing to do it, is general and unintelligible, in one or both respects. Or if it is issued for an offense not within the jurisdiction of the magistrate to try, or to arrest a person over whom he has no legal authority, and these facts appear upon the papers, they are void. Or if an officer undertakes to serve a process not within his precinct, his acts are all void: 1 Chit. Cr. L. 61; 1 East's Crown L. 309; *Grumon v. Raymond*, 1 Conn. 40 [6 Am. Dec. 200]; *Tracy v. Williams*, 4 Id. 107 [10 Am. Dec. 102]; *State v. Leach*, 7 Id. 456 [18 Am. Dec. 118]; *Nichols v. Thomas*, 4 Mass. 232. Such are some of the instances of precepts absolutely void. In all such cases, the process shows upon its face its illegality; and the officer will not be protected, because he is acting by virtue of papers which, it is apparent from their inspection, have no legal vitality. But where the magistrate exceeds his jurisdiction, or the warrant has been irregularly or erroneously issued by him, or the party has procured it through fraud and without any cause, the magistrate, or party, or both, may become liable, and the warrant may be no protection to them. It may be a void precept so far as they are concerned, but if fair and legal upon its face, voidable only so far as the officer is to be affected.

In a recent case in the queen's bench, *Andrews v. Marris*, 1 Ad. & El., N. S., 4, 17, it is said that there is a well-known distinction between the cases of the party, and of the sheriff or officer. For the latter, it is enough to show the writ only. This distinction is recognized in all the well-considered cases to be found in the books; and it is upon this basis that the doctrine of protection to officers in the service of legal process has been so broadly laid down. How far this doctrine is held to go by many of the writers on criminal law, and to what extent this protection has been carried by some of the most learned tribunals, we will for a few moments consider. East lays down the doctrine as follows: "If the warrant be legal in the frame of it, and issue in the ordinary course of justice, from a court or person having jurisdiction in the case, it is sufficient. No error or irregularity in the previous proceedings will affect it; or excuse the party killing the officer in the execution of it from the guilt of murder:" 1 East P. C. 309, sec. 78. Foster, Russell, and Roscoe, and so far as we have been able to discover, all elementary writers upon criminal law, take the same view of the matter. Foster, in his Crown Law, page 312, holds the following language: "In the case of a warrant from a justice of the peace, in a matter wherein he

hath jurisdiction, the person executing such warrant is under the special protection of the law, though such warrant may have been obtained by gross imposition upon the magistrate, and by false information touching matters suggested in it." Mr. Roscoe, in his *Criminal Evidence*, pages 750, 751, third edition, states it in this wise: "Where a peace officer, or other person having the execution of process, cannot justify without a reliance on such process, it must appear that it is legal. But by this, it is only to be understood that the process, whether by writ or warrant, be not defective in the frame of it, and issue in the ordinary course of justice, from a court or magistrate having jurisdiction in the case. Though there may have been error or irregularity in the proceedings previous to the issuing of the process, yet, if the sheriff or other minister of justice be killed in the execution of it, it will be murder; for the officer to whom it is directed must, at his peril, pay obedience to it." "So, in case of a warrant obtained from a magistrate by gross imposition, and false representations touching the matters suggested in it." "So, though the warrant itself be not in strictness lawful, as if it express not the cause particularly enough, yet if the matter be within the jurisdiction of the party granting the warrant, the killing the officer in the execution of his duty is murder, for he cannot dispute the validity of the warrant if it be under the seal of the justice." East adds further that "in case of an indictment for such a murder, it is only necessary to produce the writ or warrant; for however erroneously the process issued, the sheriff must obey, and is justified by it. The sheriff and his bailiffs are bound to obey the king's writs, without inquiry:" *Cotes v. Michill*, 8 Lev. 20; *Moravia v. Sloper*, Willes, 80, 84. Mr. Chitty also lays down the same general principles as the other elementary writers above quoted: 1 Ch. Pl. 40.

The American doctrine upon the subject is equally decisive. In *Warner v. Shed*, 10 Johns. 138, it is said that where the court has jurisdiction of the subject-matter, it is sufficient to justify the officer executing the process; for the officer is not bound to examine into the validity of its proceedings, or the regularity of its process. In *Parker v. Walrod*, 16 Wend. 514 [30 Am. Dec. 124], it is held that a ministerial officer is protected in the execution of process issued by a court or officer having jurisdiction of the subject-matter and of the process, if it be regular on its face, and does not disclose a want of jurisdiction. Process, regular upon its face, is sufficient to protect a ministerial officer acting under it, although it may have been

issued without authority: *Noble et al. v. Holmes*, 5 Hill (N. Y.), 194. If the process be regular and legal upon its face, the officer will be protected, though it be issued upon a judgment rendered without jurisdiction: *Cornell v. Barnes*, 7 Id. 35. When a writ from a court of competent jurisdiction is placed in the hands of an officer, he is bound to execute it without inquiry into the regularity of the proceedings on which it is grounded: *Cody v. Quinn*, 6 Ired. L. 191. A sheriff cannot excuse himself from the service of process because it is erroneous or irregular, but only when it is absolutely void: *Stoddard v. Tarbell*, 20 Vt. 821. Some of the cases go very far, quite as far as we should be willing to; especially that class which would compel an officer to execute voidable process. The general principle, however, we hold to be quite clear: that where the process or warrant is regular and legal in its frame, bearing upon its face all the legal requisites to make it perfect in form, and, so far as can be discovered from its inspection, in substance also, and it appears to have been issued by a court or magistrate having jurisdiction of the subject-matter and of the person of the respondent, the officer is to be protected in the service, notwithstanding any error or irregularity in the previous issuing of the same, or any imposition practiced upon the court in obtaining it; and that the party resisting the officer is liable: *Savacool v. Boughton*, 5 Wend. 170 [21 Am. Dec. 181]; *Rogers v. Mulliner*, 6 Id. 597 [22 Am. Dec. 546]; *Horton v. Hendershot*, 1 Hill (N. Y.), 118; *Fox v. Ward*, 1 Rawle, 148; *Jones v. Hughes*, 5 Serg. & R. 299 [9 Am. Dec. 864]; *Paul v. Vankirk*, 6 Binn. 123; *Sturbridge v. Winslow*, 21 Pick. 83; *Harmon v. Gould*, 1 Wright (Ohio), 709; *Brother v. Cannon*, 1 Scam. 200; *Robinson v. Harlan*, Id. 237; *State v. Curtis*, 1 Hayw. 47.; *Porter v. Gault*, 2 McMull. 33b.

The authorities cited by the respondent's counsel have all been examined, and when investigated at length, as they appear in the books to which reference is made, they show no material conflict with the general doctrine above laid down, but rather sustain it. *Tracy v. Williams*, 4 Conn. 107 [10 Am. Dec. 102], was an action of trespass against a justice of the peace for imprisoning the plaintiff, who had been arrested by the justice under the riot act, on view, and committed after having been ordered to find sureties to appear at a higher tribunal. The court held that the magistrate exceeded his power; that he might arrest on view, but could not examine and commit without regular complaint made. *State v. Leach*, 7 Id. 456 [18 Am. Dec. 118], was an information for prison

breach. The defendant had been committed upon a charge based upon a statute which was repealed before the acts complained of were done by him. There was no law in force when the acts were committed making those acts a crime. After being committed on such a warrant he broke jail, and this information was filed against him. It was held that, being imprisoned for an offense which was unknown to the law, he might lawfully liberate himself, using no more force than was necessary to accomplish the object. The court say: "The statute creating the offense with which the prisoner was charged, and for which he was committed, was repealed before the acts alleged to be a crime were done. Consequently, all the proceedings were void." This appearing upon the mittimus or warrant disclosed the illegality of the proceedings, and showed them to be void. *State v. Curtis*, 1 Hayw. 471, was where the warrant was without seal, and the court very correctly held the process void. But in the same case, the court also say that if a justice of the peace issue a warrant for a matter within his jurisdiction, although he may have acted erroneously in the previous stages, the officer should execute it. The case from 1 East's Crown L. 309, *Simpson's Case*, was where the constable undertook to serve a warrant issued by a court that had no jurisdiction of the subject-matter, and that appeared. The case from Foster, *Tooley's Case*, Fost. Cr. L. 313, was where the constable was endeavoring to serve process out of his precinct. He had no more authority out of his precinct than a private individual. He was no constable. So says the note to the case. *Housin v. Barrow*, 6 T. R. 122, cited in 1 East's Crown L. 312, was a motion to discharge from arrest, on the ground of irregularity; the sheriff's name having been inserted in the writ after it was issued. It was held that the practice was irregular, and the motion was granted. The practice of issuing blank warrants, which is reprobated by East, has no parallel in the practice of the courts of this state, except in civil cases. The practice was this: The under-sheriff signed blank warrants under the seal of the office and gave them to a clerk to fill up as occasion might require, and they were made out by the clerk to the persons calling for them, accordingly; and the persons to whom they were delivered put in the names of whom they pleased. We entirely concur with Mr. East that the practice ought to be censured in severe terms. The remarks of the court in regard to blank warrants upon which East predicates his suggestions were made in *Stockley's Case*,

in 1771, cited in 1 East's Crown L. 310. Subsequently, in 1800, the case of *Rex v. Winwick*, 8 T. R. 454, arose. Here, the magistrate kept by him a number of blank warrants ready signed. On being applied to, he filled up one of them, and delivered it to the officer, who, in endeavoring to arrest the party, was killed. It was held that this was murder in the person killing the officer, and he was accordingly executed.

Let us now recur to the facts disclosed in the first point of the case, to which this law applies. It appears that the warrant which Remick was directed to serve, and in the service of which he was resisted by the respondent Weed, was based upon a complaint for assault and battery. The complaint and warrant were both in due and legal form; the complaint being signed by the complainant, and the certificate of the oath and the warrant both duly signed by Kimball, a magistrate of the county. Nothing is defective in form, and all is regular and legal upon its face. The warrant has all the legal requisites of our statute; it is issued for an offense clearly within the jurisdiction of the magistrate, and he is acting within the limits of his county. So far, then, as appeared upon its face, it was a legal precept, which would protect an officer in its execution. But it was irregularly issued. The acts of Kimball and Quimby were irregular and illegal. And, although we do not question that both intended to act honestly, yet it is quite clear that they acted inconsiderately and illegally. But are their irregular acts to deprive the officer of his legal protection? It is said in the argument that "Quimby's testimony was wrongly admitted; that nothing short of the magistrate's certificate is evidence of the oath of the party to the instrument." This point is not raised by the case, and therefore could not properly be considered here. But if considered, we apprehend it could not aid the respondent. If Quimby was wrongly admitted as a witness to show facts behind the warrant, then also was Kimball. The testimony of both, if admissible at all, went to invalidate a warrant fair and legal on its face, and so far as it appeared, affording ample protection to the officer. Their testimony laid the very foundation of the defense, and without it the respondent could not have raised this first important point in the case. Everything touching the manner of the issuing of the complaint and warrant would have been unknown. It does not then lie in the respondent's power, first to obtain facts on which to base his defense, and then object to the channels through which alone those facts come. If the sources of the information are to be excluded, the infor-

mation itself coming from them must necessarily share the same fate.

But to return to the question, Shall the irregular acts of the magistrate deprive the officer of his legal protection in the service of the warrant? If so, then the warrant was void in his hands; he can claim no protection from it, and this indictment cannot be sustained. From the most careful and extended examination which we have been able to give this point in the case, we have no hesitancy in holding that this warrant comes clearly within the principles which we have endeavored to discuss in the preceding pages of this opinion, and for which the authorities seem to be so full and explicit; and that it was a complete and ample protection to the officer. As affecting Kimball and Quimby and the complainant, it was irregular and void; but as far as Remick was to be affected, voidable only. In the examination of this point, we have gone upon the assumption that the proceedings of the magistrate and party, prior to the issuing of the warrant, may all be inquired into, notwithstanding the process when delivered to the officer is in due and regular form, and within the jurisdiction of the justice to issue. According to the distinction which we have taken between void and voidable process, and the liabilities of the parties in the issuing and executing of the same, in an action against the justice or party for irregularity or corruption, these investigations could be made; but in any proceeding between the officer and the respondent, it may well be questioned whether the court will go behind the warrant, if it be fair and regular in its frame, and within the jurisdiction of the justice to issue. Many of the authorities above quoted lay it down distinctly that the production of the warrant or writ is all that is required by the officer, and that the prior proceedings cannot be investigated; that upon an indictment for killing the officer while attempting to serve a process, it is sufficient to produce the writ or warrant by virtue of which the officer was acting: *Rosc. Cr. Ev.*, 3d ed., 750, 751; 1 *East P. C.* 870, sec. 78. But as to this matter, it is not necessary to make any decision, although it would seem there can be but little doubt in regard to it, since we hold that the warrant, being fair and legal upon its face, was good and sufficient for the officer, and afforded him ample protection, notwithstanding the irregular and erroneous proceedings of the magistrates.

The second question raised in the case is, whether "the evidence tending to show that Remick knew that the complaint

and warrant were to be used for the purpose of enabling Nancy Pulsifer and others to get the wife of said Weed's father out of the possession of her husband, and not for the purpose of arresting and punishing said Weed," was properly rejected or not. With regard to this point, the respondent's counsel has taken several positions. His first is, that a person may resist an unlawful taking without legal cause; and that in *rescous* of cattle distrained, the defendant may defend by showing a distress without legal cause. To sustain this position, he cites *Melody v. Reab*, 4 Mass. 474. An examination of this case shows that it was an action brought to recover the penalty provided by statute for rescue of cattle distrained, and the court decided that, by the common law, the illegality of the distress might be shown in defense of an action for rescue; but by this statute it was provided that such a defense should not be set up. It will readily be perceived that there is a marked difference between an illegal distress of cattle by a party, and the doings of an officer under legal process.

His second position is, that an owner of goods may resist an officer attempting to seize them under writ against a third person. Several authorities are cited to sustain this position. But there was no necessity for this. The accuracy of this doctrine we are not disposed at this time to question. If a sheriff has a writ against A, and by virtue of it undertakes to seize the property of B, B may resist. The sheriff has no right to take his property. Were the suit against B, it would present an entirely different question, and one of equally easy solution.

His third position is, that a respondent may resist against a lawful process used for an illegal purpose; and the evidence as to the purpose of Wade's arrest was wrongly excluded. To sustain this position, he cites Bull. N. P. 172. This, it will be found, is a discussion of defenses to actions of covenant, debt, contract, etc., and it is said that duress is a good defense to such actions. In *Anonymous*, Aleyn, 92, also cited, it was held that duress is a good defense to debt on bond. *Shaw v. Spooner*, 9 N. H. 197 [32 Am. Dec. 348], was an action on a note given to settle a criminal prosecution, as was alleged, and the court held such a consideration void. So, also, with the cases of *Plumer v. Smith*, 5 Id. 553 [22 Am. Dec. 478], and *Hinds v. Chamberlin*, 6 Id. 225. Both were actions on notes given to suppress or settle criminal prosecutions, and the same decision was made. The case of *Richardson v. Duncan*, 3 Id. 511, was where money had been paid to procure a discharge from arrest,

and the court held it might be recovered back. *Watkins v. Baird*, 6 Mass. 506 [4 Am. Dec. 170], was *assumpsit*. Plea, a release; replication, that the release was procured by duress. The duress being proved, it was held that the release was void. The case of *Hatter v. Greenlee*, 1 Port. 222 [26 Am. Dec. 870], is the same doctrine as that of *Watkins v. Baird*, *supra*. Now, although these authorities may be very good law in actions between individuals, where questions of duress and the settlement of criminal prosecutions may arise, yet we do not discover their force to sustain the position that the evidence as to the purpose of Weed's arrest was wrongfully excluded. They might perhaps be in direct authority in private actions between the Weeds and Nancy Pulsifer, on the ground that she was using the warrant for illegal purposes, but we cannot discover their applicability to the present case.

In deciding this point, we are to proceed upon the supposition that the complainant had illegal objects to obtain in procuring the warrant. We are also to take it that Remick knew that her objects were illegal. But does that excuse this respondent from committing an illegal and criminal act himself? Surely not. Many prosecutions that are commenced proceed from no very worthy motives or commendable objects. Sometimes they are instituted to bring about a settlement of other prosecutions, either criminal or civil. At other times, to extort money from the offender; and sometimes to accomplish other illegal purposes. But an officer with a legal process in his hands is not to be governed by the motives or objects of prosecutors. His duty is plain and imperative. It is to execute the process, regardless of any such influences. Suppose a theft has been committed, or a rape, and the complainant causes a warrant to be issued, with no other or better object than to extort money from the offender, and the officer knows that such is the object, is he to refuse to serve the warrant? Is a higher crime to go unpunished because a less one is meditated? If such be the doctrine, then every offender, however great his crime, may resist and kill an officer who shall attempt to serve a process which he knows has been procured from improper motives and corrupt designs on the part of the complainant. Every murderer may go at large, because the complainant having procured a warrant to effect some criminal object, and not to punish the offender, the officer into whose hands the warrant has been committed having been made acquainted with the designs of the complainant, does

not execute the process; for knowing its object, he has no protection from the law. This may seem to be stating the position rather strongly, and yet it is only carrying out the principle contended for in this case. But we think it will not answer to hold any such doctrine. Officers are punishable by indictment or civil suit, for all illegal or oppressive acts done by them: Co. Lit. 233, 234; Bac. Abr., tit. Office and Officers, N; *Rex v. Bembridge*, 3 Doug. 327; *Rogers v. Brewster*, 5 Johns. 125; *State v. Stalcup*, 2 Ired. L. 50; *Geter v. Commissioners*, 1 Bay, 324 [1 Am. Dec. 621]. But while in the execution of their offices they are under the peculiar protection of the law, a protection which is founded in wisdom and in every principle of political equity; for without it the public tranquillity cannot possibly be maintained, or private property secured; nor in the ordinary course of things will offenders of any kind be amenable to justice.

Such is the language of Roscoe, who goes so far as to say that every citizen is bound to submit even to illegal process; and East and Hale express the same opinion. Baron Hume (1 Hume, 250), says that if, instead of submitting for the time, and looking for redress afterwards, the defendant shall resist an illegal warrant, it shall be murder. But it is not necessary to carry the principle to that extent in this case. The point is, that the complainant had an illegal design in procuring the warrant and causing it to be executed; and we decide that the motives, intents, and designs of complainants have nothing to do with the duty of an officer. He is to execute all precepts put into his hands which are fair and legal upon their face, and will be protected in so doing, even though he knows that the objects of the complainants are illegal. Nor are we without high American authority for sustaining this position. In *Webber v. Gay*, 24 Wend. 485, it was held that a constable was protected in the service of a process which he knew was irregular and erroneous. The chief justice, in delivering the opinion of the court, says: "I am not aware that the court has ever looked beyond the process to see if the officer was cognizant of the irregularity. The general rule is, that if the justice has jurisdiction of the subject-matter, and if the process is regular upon its face, the officer is protected. To go beyond this, would lead to a new and troublesome issue, which would tend greatly to weaken the reasonable protection to ministerial officers. Their duties, at best, are sufficiently embarrassing and responsible." Such also is the doctrine of *People v. Cooper*,

13 Id. 379. In the *People v. Warren*, 5 Hill (N. Y.), 440, it was held, that "a ministerial officer is protected in the execution of process regular and legal on its face, though he has knowledge of facts rendering it void for want of jurisdiction." This prosecution was an indictment against Warren for an assault and battery upon one Johnson, an officer, and resisting him in the service of a warrant against Warren. The warrant was issued by the inspectors of election of the city of Utica, for interrupting the proceedings of the election, and disorderly conduct in their presence. The respondent offered to prove that he had not been in the presence or hearing of the inspectors at any time during the election, and that Johnson knew it. The evidence was ruled inadmissible, and the ruling sustained by the court above. In deciding the matter, the court say: "Although the inspectors had no jurisdiction of the subject-matter, yet as the warrant was regular upon its face, it was a sufficient authority for Johnson to make the arrest, and the defendant had no right to resist the officer. The knowledge of the officer, that the inspectors had no jurisdiction, is not important. He must be governed and is protected by the process, and cannot be affected by anything which he has heard or learned out of it. The officer is protected by process regular and legal upon its face, whatever he may have heard going to impeach it."

Having discussed the two principal points of the case at so much length, it is hardly necessary to add much respecting the others, inasmuch as the disposition of them follows, almost necessarily, the decision of the first two. A word or two, however, in regard to them. It appears from the case that the respondent proposed to introduce evidence that the foundation of the complaint on which the warrant issued was false and groundless, but the court excluded the evidence.

Many of the authorities already cited are applicable and direct upon this point, and we will therefore add only two. The first is to be found in 1 East P. C. 310, and is as follows: "Where a warrant has been obtained improperly, and by perjury, it varied not the offense of him who killed the officer in attempting to execute it." The other is the case of *Watson v. Watson*, 9 Conn. 141 [23 Am. Dec. 324]. In this case, it appeared that the officer knew that the plaintiff had no cause of action, and the point was decided in these words: "It is the duty of an officer, in which he will be protected, to obey, without investigating the cause of action, every precept put into his hands for service, which appears on its face to have issued

from competent authority and with legal regularity. Consequently, his knowledge of facts evincing the existence or want of a cause of action does not affect his duty or liability." The court also say: "Obedience to all precepts committed to an officer to be served, is the first, second, and third part of his duty. Being a legal officer, it became his duty, regardless of any knowledge, or supposed knowledge, that there existed no cause of action, to serve the writ committed to him promptly, unhesitatingly, and without restraint from the above-mentioned cause. This I consider so firmly established as to render the proposition self-evident. The facts on the face of the writ constitute his justification, because he was obliged to obey its mandate."

There can be no doubt in regard to this point. To carry out the doctrine contended for would be subversive of all legal proceedings. How many civil suits are instituted without any cause of action whatever! and how many criminal prosecutions are entirely without foundation! To hold that an officer is not to be protected in the service of such precepts, but may be resisted with impunity, would impose upon him the necessity of investigating the facts and deciding every case correctly, before his property or life would be safe. No man who regarded either would accept the office. For if he could be resisted in the service of process, where the "foundation of the complaint was false and groundless," not only would his life be exposed in its service, but he must, as a necessary consequence, be liable as a trespasser, or for false imprisonment, whenever it should appear that the proceeding was without cause. The mischiefs resulting from such a doctrine must be very great, and are too apparent to require further comment.

The official character of Remick, not being in dispute, but well known to the respondent, the instructions of the court to the jury, "that if they found that Weed did not know that Remick had a warrant and was seeking to arrest him, then he was not guilty," were quite as favorable to the prisoner as the law would permit: 1 Hale P. C. 461; *State v. Caldwell*, 2 Tyler, 212; Wharton's Cr. L. 318. But no objection to this ruling has been taken in the argument. If either party had cause to complain of those instructions, it would probably be the government. No further examination of them is necessary.

Having gone through with all the general positions presented in the case, we might stop here. But, as we are desirous of looking at this case in all its particulars, there is one other matter to which we will devote a moment's attention. It is, that

these proceedings were contrary to the nineteenth article of the bill of rights, and therefore illegal. This article provides that no warrants shall issue if the cause or foundation of them be not previously supported by oath or affirmation. It will be perceived that this point, going to the regularity of the proceedings, is but a subdivision of the first general position, and that the doctrine laid down there covers this exception; still, as there has been an adjudication where this direct question arose, we will quote it here. We refer to *Sandford v. Nichols*, 13 Mass. 286 [7 Am. Dec. 151]. In that case, a warrant, issued by virtue of the constitution of the United States, was put into the hands of an officer, commanding him to search for certain goods. The warrant recited that a complaint had been made, but none was annexed to or accompanied the warrant, nor does it appear by the report of the cases that any complaint was ever actually made. One of the questions raised was, that a complaint in writing, under oath, should be shown as the foundation of the warrant, the constitution of the United States providing that "no warrants shall issue but upon probable cause, supported by oath or affirmation." Parker, C. J., in delivering the opinion of the court, says: "We think that the defendants could have justified the acts complained of, by showing a regular warrant from a magistrate having jurisdiction over the subject, without showing that it was founded upon a complaint under oath. It will not do to require of executive officers, before they shall be held to obey precepts directed to them, that they shall have evidence of the regularity of the proceedings of the tribunal which commands the duty. Such a principle would put a stop to the execution of legal process, as officers so situate would be necessarily obliged to judge for themselves, and would often judge wrong as to the lawfulness of the authority under which they are required to act. It is a general and known principle that executive officers, obliged by law to serve legal writs and process, are protected in the rightful discharge of their duty, if those precepts are sufficient in point of form and issue from a court or magistrate having jurisdiction over the subject-matter. If such a magistrate shall proceed unlawfully in issuing the process, he, and not the executive officer, will be liable for the injury consequent upon such act."

The requirements of the constitution of the United States are quite as explicit as those of our bill of rights; and the language of Chief Justice Parker is but the language of many other distinguished jurists, whenever the duties, obligations,

and protection of officers has been the subject discussed. And after a careful and somewhat extended examination of the several positions taken by the respondent, the conclusion of the court is that none of the exceptions can be sustained, and that there must be judgment on the verdict.

OFFICER SERVING PROCESS, WHEN PROTECTED: *Savacool v. Boughton*, 21 Am. Dec. 181, and note, where the subject is fully discussed; see also the following cases, and prior decisions referred to in the notes thereto: *Stevenson v. McLean*, 42 Id. 434; *Byles v. Ashby*, 43 Id. 47; *Dunlap v. Hunting*, Id. 763; *Cody v. Quinn*, 44 Id. 75. When the authority under which an officer acts is voidable only, he may justify under it, but not when the authority is void: *Batchelder v. Currier*, 45 N. H. 468; and there is a clear distinction between the officer executing the writ and the party who procures it to be issued, for as against the latter it may be shown to be void for facts not appearing upon its face: *Ex parte Thompson*, 1 Flipp. 514. The officer is protected if the process is in due and legal form, and regular upon its face, notwithstanding any irregularity or illegality in issuing it: *Gordon v. Clifford*, 28 N. H. 418; and although the officer might know of such irregularities: *Underwood v. Robinson*, 106 Mass. 296. An officer has nothing to do with the propriety of the process under which he acts, provided the court has jurisdiction and the process is regular upon its face: *Keniston v. Little*, 30 N. H. 323. In *Kelley v. Noyes*, 43 Id. 210, it was held that an officer making an arrest under a statute providing "that no person to whom any list of taxes shall be committed for collection shall be liable to any suit or action by reason of any irregularity or illegality of the proceedings of the town or the selectmen, nor for any cause whatever, except his own official misconduct," was put upon the footing of a sheriff acting under process from a court of competent jurisdiction, which would be an effectual justification, though the process be erroneously issued. In all the foregoing cases the principal case was cited.

PROCESS ISSUED BY JUDGE in excess of his jurisdiction renders the judge, together with the party at whose instance he acted, liable as a trespasser: *Barkeloo v. Randall*, 32 Am. Dec. 46, and prior cases in note; although it is otherwise if issued within his jurisdiction: *Pratt v. Gardner*, 48 Id. 652.

CHANDLER v. WALKER.

[21 NEW HAMPSHIRE, 282.]

GIST OF ACTION OF TRESPASS QUARE CLAUSUM FREGIT is the disturbance of the possession.

TRESPASS QUARE CLAUSUM FREGIT MAY BE MAINTAINED AGAINST WRONGDOER by one in actual possession without, or constructive possession with, title.

POSSESSION IS SUFFICIENT TO MAINTAIN TRESPASS AGAINST MERE WRONGDOER for cutting timber from the unfenced portion of a lot, when occupied for several years up to a spotted line, as a part of a farm, and as a wood and timber lot attached thereto, other portions of the lot being cleared, cultivated, and fenced.

TO MAINTAIN TRESPASS QUARE CLAUSUM FREGIT AGAINST MERE WRONG-DOER, it is unnecessary that the land shall be inclosed, where possession is known, marked, and uninterrupted.

OBJECTION FOR VARIANCE BETWEEN DECLARATION AND PROOF, when not taken at the trial, will be considered as waived.

TRESPASS *quare clausum fregit* for cutting and carrying away a quantity of timber from a lot designated as No. 6 in the second range of lots in Chatham. The plaintiff claimed that he had been in possession of this lot, as well as lot No. 7, adjoining it on the south, but offered no paper title to the lots. The facts in regard to the possession appear in the opinion. The defendants requested the court to direct a nonsuit, after the plaintiff's evidence was closed, since there was no competent evidence to be submitted to the jury, the plaintiff having no paper title; but the motion was denied. No evidence of title, possession, or right of possession in themselves or others was offered by the defendants, but they gave evidence that the spotted line claimed by the plaintiff to be on the north side of lot No. 6, was not the true north line, but that it was farther south, and south of most of the cutting done by them. The defendants requested the court to charge the jury that erecting part of a line fence was not a sufficient possession to maintain trespass; and clearing and cultivating part of the lot did not give possession of the residue, it being wild and uncultivated and uninclosed land, and no buildings being thereon; but the jury were instructed that if the plaintiff had been in possession of the *locus in quo* for thirteen or fourteen years, as claimed, occupying it as part of lot No. 6, up to the spotted line, and as part of his farm, and as a wood and timber lot attached and belonging thereto, the possession would be sufficient to maintain trespass against persons, like the defendants, who showed no title, possession, or right of possession; and it was unnecessary that there should be a fence upon the whole length of the spotted line. A verdict was returned for damages, and the defendants moved to set the same aside, and for a new trial. It was contended by the defendants, on a former argument of the case before this court, that the declaration was not broad enough to cover the *locus in quo*, since the evidence of the defendants tended to show that the spotted line was not the true line, but that the true line was farther south, and south of most of the cutting done by them; and the case was thereupon continued on motion.

J. Eastman, for the plaintiff.

Hobbs, for the defendants.

By Court, EASTMAN, J. The gist of the action of trespass *quare clausum* is the disturbance of the possession. At common law, it is not properly an action to try titles, and the question of title does not necessarily arise. It may, however, and often does, where the real ownership is in dispute, and it becomes material to show in whom the rightful possession is. In South Carolina and Alabama, the action of trespass is expressly given by statute to try and settle titles to real estate. But where the matter is not regulated by statute, the decision of an action of trespass settles nothing in regard to the title beyond the action tried. Whenever the question of title is not raised, so that there is no conflict as to the true ownership, and no title, possession, or right of possession, is shown on the part of the defendant, actual possession by the plaintiff is all that is required to sustain the action. And as against a wrong-doer—one who has no right whatever to be upon the property—constructive possession, accompanied with the right, is also sufficient: 1 Ch. Pl. 195; *Rex v. Watson*, 5 East, 485; *Hall v. Davis*, 2 Car. & P. 33; *Revett v. Brown*, 5 Bing. 9; *State v. Newton*, 5 Blackf. 455; *Brandon v. Grimke*, 1 Nott & M. 356; *Reed v. Shepley*, 6 Vt. 602; *Anderson v. Nesmith*, 7 N. H. 167. In addition to the above authorities, there are numerous others which sustain the same positions; and the language of courts is substantially the same. We will instance a few of them: "Actual possession without a legal title is sufficient against a wrong-doer:" 1 Ch. P. 196; *Graham v. Peat*, 1 East, 244; *Chambers v. Donaldson*, 11 Id. 74; *Myrick v. Bishop*, 1 Hawks, 485; *Richardson v. Murrill*, 7 Mo. 333. This form of action is used for the violation of the plaintiff's possession; if he be in the actual occupancy, he can maintain the action without title: *Johnson v. McIlwain*, 1 Rice, 375; *Cohoon v. Simmons*, 7 Ired. L. 189. The plaintiff is bound only to show that the land was in his possession, either actual or constructive, at the time of the alleged trespass: *Dolloff v. Hardy*, 26 Me. 554. And possession alone, although for a less term than twenty years, is sufficient to maintain an action of trespass *quare clausum*, except against one who can exhibit a legal title: *Moore v. Moore*, 21 Id. 350. Possession of land is sufficient to enable a party to maintain trespass against all who can show no better title, and an entry and survey are sufficient evidence of possession against all who can show no better title: *Wendell v. Blanchard*, 2 N. H. 456; *Sinclair v. Tarbox*, Id. 135; *Proprietors of Concord v. McIntire*,

6 Id. 527. So entirely does this action depend upon the disturbance of the possession, that the owner of land cannot maintain it while the premises are in the actual occupation of the tenant: *Holmes v. Seely*, 19 Wend. 507; *Anderson v. Nesmith*, 7 N. H. 167; *Robertson v. George*, Id. 306. Perhaps it may be maintained by the owner where the entry is accompanied with a permanent injury to the freehold: *Robertson v. George*, *supra*. But for the cutting of grass it can only be maintained by the tenant in possession: *Bartlett v. Perkins*, 13 Me. 87. Actual possession, then, without title, or constructive possession with, is sufficient to maintain this form of action against a wrong-doer.

There is no pretense of title, possession, or right of possession on the part of the defendants in this case. They stand in the position of mere wrong-doers; and if they can succeed, it must be because the plaintiff has failed to show himself in possession, either actual or constructive. Producing no paper title, and showing no legal right of ownership to the property, the plaintiff stands solely upon his possession. Was that such as would give him a right to maintain this suit? The case finds that lots 6 and 7 were adjoining each other; No 6 being the northerly lot, and the plaintiff's buildings being upon lot No. 7. On the north side of No. 6 was an ancient spotted line. The easterly part of that lot was cleared up to and along that line, and a fence made as far as the clearing went. This clearing was occupied as a pasture. The southerly part of this lot was cultivated; and the north-westerly part, where the trespass was committed, was wood and timber land; and the jury have found that the plaintiff had occupied that part of said lot for the last thirteen or fourteen years, up to said spotted line, as a part of his farm, and as a wood and timber lot attached, and belonging to the same. The lot was not inclosed on the north, except at the easterly end, where the pasture was, but it was occupied for all the ordinary purposes of a farmer's wood-lot, up to a definite and known line, just as much as though fenced. Whether such an occupancy, had it continued uninterrupted for twenty years, would have been sufficient to have gained title by adverse possession, does not necessarily arise in this case. It appears, however, to have been open, visible, and marked by definite boundaries.

But this controversy is not between parties standing in the same position. This action is not a writ of entry by which the title is to be determined. The plaintiff shows the ordinary and common possession of like property in most instances, while

the defendants show no possession or title whatever, either in themselves or others. Many wood-lots are not fenced for a long series of years; and where the possession is known, and marked, and uninterrupted, it is not necessary that the property should be inclosed, in order to maintain an action of trespass *quare clausum* against a mere wrong-doer.

Some cases are very direct upon this point. *Catteris v. Cowper*, 4 Taunt. 547, is one of them. In that case, it being proved that the defendant had entered the land and taken the produce, the question was made, whether the plaintiff had proved such a possession of the *locus in quo* as would enable him to maintain the action. The *locus in quo* was a piece of waste land lying between the farm which the plaintiff rented and the river Ouse. It bore grass, which every one cut who pleased, until within two years before the action; and the plaintiff's only title was, that two years before, he had taken possession, and twice mowed the grass, and had since pastured a cow there. The defendant's testimony was, that the first time the plaintiff cut the grass he boasted that he had cut hay off of land for which he paid neither rent nor taxes; that in a former year the plaintiff bought the hay cut by another man off from this same land; and that a few years before the trial, in repairing the boundary fence of his farm, he excluded, by his fence, the land in question, and had frequently shown to other persons the boundaries of his farm as excluding this land. The court held the defendant's evidence insufficient to disprove the plaintiff's title, and that there was sufficient evidence of possession on the part of the plaintiff to maintain the action against a wrong-doer. The marginal note to this case is as follows: "Mere prior occupancy of land, however recent, gives a good title to the occupier, whereupon he may recover as plaintiff against all the world, except such as can prove an older and better title in themselves." In *Inhab. of Barnstable v. Thacher*, 3 Met. 239, it was held that an entry upon a piece of waste cranberry-land, and putting up stakes about it, and notices upon the stakes that possession had been taken, was a sufficient possession, without any other title, to maintain trespass, except against the right owner, or the person having the prior right of possession. And it is further said, in that case, that "to maintain an action of trespass, it is not necessary to have such a possession as amounts in law to a disseisin."

To the same effect is *Cook v. Rider*, 16 Pick. 186. In *Townsend v. Kerns*, 2 Watts, 180, it is said that trespass is emphati-

cally an action founded on possession, and the defendant cannot rely upon the plaintiff's want of title. In *Machin v. Geortner*, 14 Wend. 239, the plaintiff proved that he occupied the *locus in quo* as a wood-lot, cutting thereupon his wood, and rails for fencing, and some saw-logs; but the lot was not fenced, nor was there any clearing upon it, nor did he produce any title to it. The defendant thereupon moved for a nonsuit, because the plaintiff had failed to prove himself in actual possession of the *locus in quo*. The motion was overruled; the court holding that proof that the premises were used as a wood-lot was sufficient evidence of actual possession to maintain the action against a person showing no rights. And in *Penn v. Preston*, 2 Rawle, 14, the court say: "Possession of a farm draws to it the possession of the woodland belonging to it, though not inclosed; and the party in possession may maintain trespass against a wrong-doer for destroying timber on such woodland."

Looking, then, at the nature of this form of action, the purposes for which it is used, and the authorities upon the subject, as applicable to the facts presented in this case, we cannot doubt that the rulings of the court below, and the instructions given to the jury, were correct.

In examining the case, we have not considered the question whether the declaration was broad enough to cover the *locus in quo*, or not, because that question, not being raised at the trial, but it appearing that the case was tried mainly upon the fact of possession, it is too late to take that exception now. If an objection on account of variance between the declaration and the proof be not taken at the trial, it will be considered as waived: *McConihe v. Sawyer*, 12 N. H. 896.

Judgment on the verdict.

POSSESSION REQUIRED TO MAINTAIN TRESPASS QUARE CLAUSUM FREGIT: *Wilsons v. Bibb*, 25 Am. Dec. 118; *Truss v. Old*, 18 Id. 748; *McColman v. Wilkes*, 51 Id. 637; and the possession must be actual and not constructive: *McClain v. Todd's Heirs*, 22 Id. 37; *Cannon v. Hatcher*, 26 Id. 177. A landlord has neither actual nor constructive possession during the continuance of the lease so as to enable him to maintain the action: *Gibbons v. Dillingham*, 50 Id. 233; but a guardian may bring the action for injury to the ward's real estate: *Palmer v. Oakley*, 47 Id. 41. Title to the land, however, is sufficient, if no one is in actual possession: *Gillespie v. Dew*, 18 Id. 42; *Van Rensselaer v. Radcliff*, 25 Id. 582; *Bakersfield Cong. Soc. v. Baker*, 40 Id. 668; and see *Cannon v. Hatcher*, 26 Id. 178.

POSSESSION IS SUFFICIENT TO MAINTAIN TRESPASS QUARE CLAUSUM FREGIT AGAINST MERE WRONG-DOER: *Wilsons v. Bibb*, 25 Am. Dec. 118; *Potter v. Washburn*, 37 Id. 615; *Heath v. Williams*, 43 Id. 265; *McColman v.*

Wilkes, 51 Id. 637; and a party in possession may maintain the action against a stranger, although he has conveyed to a third person who has never entered into possession: *Hayward v. Sedgley*, 31 Id. 64. A tenant entitled to a way-going crop, who enters and warns a third person against cutting it, may bring the action against the wrong-doer, notwithstanding he had previously to the trespass given up to his landlord possession of the farm, in a part of which the crop was growing: *Stultz v. Dickey*, 6 Id. 411.

VARIANCE BETWEEN ALLEGATIONS AND PROOFS, when not considered on appeal, or waived: *Driggs v. Dwight*, 31 Am. Dec. 283, and note; *Jones v. Hardesty*, 32 Id. 180.

THE PRINCIPAL CASE IS CITED in *Little v. Downing*, 37 N. H. 368, to the point that where in trespass *quare clausum fregit* with a *continuando*, the plaintiff failed to prove an entry within the period specified in the writ, he is at liberty to waive the time alleged in the declaration, and having proved any single act of trespass at any time before action brought, may recover damages therefor.

SAYLES v. SAYLES.

[21 NEW HAMPSHIRE, 312.]

CONTRACT HAVING FOR ITS OBJECT DISSOLUTION OF MARRIAGE RELATION is against public policy, and is illegal and void.

AGREEMENT TO WITHDRAW OPPOSITION TO DIVORCE PROCEEDINGS cannot form a valid consideration for a promissory note, and the note is void.

ASSUMPSIT. The plaintiff produced on the trial a promissory note for four hundred dollars, payable to him and signed by the defendant. One Blaisdell had previously appeared as counsel for the defendant's wife, on a petition for a divorce filed by her husband against her, not for the purpose of making a defense, as Blaisdell testified, but to obtain an allowance for her support. Afterwards, Blaisdell and the defendant made an agreement by which all opposition to the defendant's obtaining a divorce from his wife was to be withdrawn; or at least, according to Blaisdell's testimony, withdrawn in so far as applying for an allowance was concerned. According to this agreement, the defendant was to make a note for four hundred dollars, securing the same by a mortgage on his farm, and give up to his wife, or to her son, the plaintiff in this suit, certain household furniture. The defendant also agreed to pay, and did pay, half of Blaisdell's costs. The papers were left with a third person, to be delivered to the plaintiff or his mother if the defendant obtained a divorce, but if the wife opposed, they were to be returned to the defendant. They were accordingly delivered to the plaintiff when the divorce was obtained. A verdict for the defendant was directed, the presid-

ing justice being of the opinion that the contract was fraudulent and illegal. The plaintiff's counsel excepted, and moved to set aside the verdict.

Weeks, for the plaintiff.

Kittredge, for the defendant.

By Court, Woods, J. It is alleged on the part of the defendant, that the consideration upon which the promise in the note declared on rests was illegal, as being against public policy, and that the note is void for that cause. The note was given upon the consideration, and was to be paid only upon the condition that the wife of the defendant would withdraw all opposition to the petition of the defendant for a divorce pending at the time against her in this court. It may well be inferred from the fact of the agreement that it was the belief of both parties that no divorce would or could properly have been granted if full defense had been made, and that the arrangement made resulted from that view of the case; and the facts disclosed by the testimony of the counsel of the libelee fully sustain this view. That witness testifies that the cause of divorce alleged in the petition was desertion, as he thought, and that "he thought he could prove her to be one of the most amiable women in Grafton, and that her husband abused her without measure." It was opposition upon this ground that was no longer to be insisted upon, but was to be withdrawn, and was withdrawn, as the consideration of the note in question, and it is quite obvious that Mrs. Sayles must have believed that her ground of opposition would, if persisted in, and made out in proof, have been entirely sufficient. She could hardly have failed to have received such advice from the learned counsel who had been employed to make her defense. Desertion forms no legal ground of divorce, unless it be without sufficient cause, and it could scarcely be said that an amiable woman, "abused without measure," had no such cause for deserting her husband. The evidence in this case pretty fully establishes, indeed, we see not how it establishes any other than a case of collusion between the parties, to obtain a divorce at the hands of the court, when both parties knew, or had good reason to believe, that no sufficient legal cause existed. No such agreement, even if executed, can form a valid consideration for either a verbal or written promise. The great and principal object of the agreement made between the parties was to bring about a dissolution of the marriage contract, and

to put an end to the various duties and relations resulting from it. Any contract, having any such purpose, object, and tendency, cannot be, in law, sustained, but must be regarded as being against sound public policy, and consequently illegal and void. The marriage relation is one to be encouraged and maintained, when formed.

Such is the well-settled policy of the law, and its dissolution or determination is not to be left to depend upon the caprice of the parties. If determined, it must be done in accordance with some positive enactment of law, and in due course of judicial proceedings. The good order and well-being of society, as well as the laws of this state, require this. The collusive character of the proceedings disclosed in this case, if brought to the knowledge of the court, would have furnished abundant and conclusive reasons for denying the prayer of the petition. The decisions in England and in this country have gone the length of upholding contracts having for their object the separation of husband and wife *a mensa et thoro*, and providing for a separate allowance for the wife, through the intervention of a trustee, in cases where the parties are already living separately, or where the agreement is that the separation shall take place immediately. Such contracts for separation and a separate maintenance have been sanctioned by many early English decisions, and the same doctrine has been followed by several American cases: *Jee v. Thurlow*, 2 Barn. & Cress. 547; *Rex v. Mead*, 1 Burr. 542; *Rodney v. Chambers*, 2 East, 297; *Carson v. Murray*, 3 Paige, 483; *Bettle v. Wilon*, 14 Ohio, 257; *Baker v. Barney*, 8 Johns. 73 [5 Am. Dec. 326]; *Shelthar v. Gregory*, 2 Wend. 422; *Nurse v. Craig*, 2 Bos. & Pul. N. R. 148; *Todd v. Stoakes*, 1 Salk. 116.

In delivering the judgment of the court, in the case of *St. John v. St. John*, 11 Ves. 526, and *Westmeath v. Westmeath*, Jac. 126; and again in *Westmeath v. Westmeath*, in the house of lords, as reported in 1 Dow & C. 544, Lord Eldon freely expressed his opinion that public policy forbade any agreement for a separation between husband and wife, except under the sanction of a court of justice. Mr. Chancellor Walworth, in *Carson v. Murray*, 3 Paige, 483, although he felt himself bound by the authority of the early decisions, which recognize the validity of such agreements for a separate maintenance, declared his unwillingness to extend the principle beyond the adjudged cases. Mr. Chitty says that "an instrument which contemplates and provides for the future separation of husband and wife, or is calculated to promote a future separation, is not

legal:" Chit. Con., 5th Am. ed., 672. The case of *Westmeath v. Westmeath*, Jac. 126, before cited, fully recognizes the doctrine as laid down by Mr. Chitty. In *Durant v. Titley*, 7 Price, 577, it was determined that articles of agreement, which hold out a premium for a separation, are not to be sanctioned, being considered as directly contrary to the policy of the law. So a sealed bill, promising to pay a sum of money, provided the obligee is not lawfully married within six months from the date, was holden to be illegal and void: *Sterling v. Sinnickson*, 2 South. 756.

The cases cited show with what strictness and care the law guards and upholds the marriage relations; and that no contract, having for its object their dissolution, or calculated to disturb them, can be sustained. In this state, at least, a separation *a vinculo* can only be effected through a decree of the courts of law. No agreement of the parties can have that effect. Sound policy as well as the established law forbids it, and any agreement made in fraud of the purposes of the law, and against its policy, is illegal and void. The note under consideration was clearly a contract, resting on no other foundation than such an agreement. It must, as has already been suggested, have been well understood by all who took part in the transaction out of which the note sprung, that if the facts of the case were brought to the knowledge of the court, no decree of divorce would be granted. By the agreement, the evidence of the facts touching the cause alleged in the libel was to be suppressed, and was suppressed, and the divorce was by that means obtained in a case where, by law, and according to law, it could not have been done. And now, as the fruits of this collusive and fraudulent imposition upon the law and the court granting the divorce, the plaintiff asks the aid of this court, in enforcing the contract of the defendant. We are, however, aware of no principle of law or justice that will warrant the court in aiding a party, by its judicial action, to gain possession of what can only be regarded as the fruits of a palpable fraud, practiced both upon the law and the court that administered it.

There was no fact in dispute upon the evidence in this case. The case presents nothing but a question of law arising upon an uncontradicted state of facts. There was nothing, then, to be submitted to the jury, and the direction of a verdict for the defendant, by the court below, was well authorized by the practice in this state.

Judgment on the verdict.

CONTRACTS FACILITATING DISSOLUTION OF MARRIAGE VOID.—In 2 Bishop on Marriage and Divorce, 5th ed., sec. 239, the following language is used, citing the principal case: "It has been held that an agreement made by a defendant in a divorce suit, to withdraw his or her papers, and make no defense, is void, as being against public policy; therefore a promissory note executed in pursuance of such an agreement, and in consideration thereof, is a contract which cannot be enforced against the maker." This language is quoted with approval in *Everhart v. Puckett*, 73 Ind. 412, where it was also held that an agreement that a defendant in a divorce suit would make no defense was void, and a note executed upon such consideration could not be enforced. In *Weeks v. Hill*, 38 N. H. 204, it was said that the principle upon which *Sayles v. Sayles* was decided applied to a case where an agreement was made between the overseer of the poor of a town, and a husband whose wife was supported as a town charge, to the effect that the town would refrain from making opposition to a libel for a divorce filed by the husband against the wife, and such agreement was held to be against public policy and void. Where, during marriage, the husband erected a building on land belonging to his wife, upon an agreement that he should receive the rents and profits until reimbursed for his expenditures, and before he obtained any receipts the wife applied for a divorce, and pending its application an agreement was made that the wife should pay a certain sum in compromise of the husband's claim one day after the divorce should be obtained, the agreement to pay such sum is void, since it was to take effect only on condition that a divorce should be granted, and its tendency was to interest the husband in procuring a divorce, or in foregoing resistance to an effort by his wife to that end: *Muckenburg v. Holler*, 29 Ind. 141. And money advanced to the husband, at the request of the wife, in consideration of his making no opposition to a bill for a divorce, being for an illegal and immoral consideration, cannot be recovered of her on her express promise to pay: *Viser v. Bertrand*, 14 Ark. 283. An agreement between a husband and wife, in respect to alimony, made for the purpose of facilitating a divorce, in proceedings already commenced, or about to be instituted by one against the other, is void, and a note given in pursuance of such an agreement, and upon no other consideration, is also void: *Adams v. Adams*, 25 Minn. 77, 79. In all the preceding, the principal case was cited as authority. But in *Daggett v. Daggett*, 28 Am. Dec. 442, it was held that an agreement between the parties for alimony, made pending a suit for divorce, will not be sustained unless shown to be perfectly fair towards the wife.

AGREEMENT BETWEEN HUSBAND AND WIFE FOR SEPARATION, whether valid: *Mercein v. People*, 35 Am. Dec. 653, and prior cases in note; *People v. Mercein*, 38 Id. 644.

ALDRICH v. CHESHIRE RAILROAD COMPANY.

[21 NEW HAMPSHIRE, 359.]

AWARD OF DAMAGES BY COMMISSIONERS FOR INJURIES IN CONSTRUCTING RAILROAD IS NOT CUMULATIVE, but the result is conclusive, unless an appeal be taken.

DAMAGES ASSESSED BY COMMISSIONERS for excavations in land are presumed to include damages for all injuries.

PERSON NOT LIABLE AS WRONG-DOER WHEN ACT IS AUTHORIZED BY LEGISLATURE, the necessary and natural consequence of which is damage to another's property, and the mode in which damage shall be ascertained and compensated is prescribed.

CASE. The plaintiff alleged that the defendants, by excavations, had diverted the water of a permanent spring upon his farm from its accustomed course. His evidence showed that before the excavations were made the water from the spring was abundant to supply his house, barn, and to irrigate his land; but after they were made the water of the spring disappeared, and a stream began to flow in the cut, several feet below the surface, and a short distance above the railroad grade. The corporation was authorized to construct the road, and damages had been assessed to the plaintiff for passing through his land. The plaintiff had a verdict for three hundred dollars, which the defendants moved to set aside.

Wheeler, for the defendants.

Chamberlain, for the plaintiff.

By Court, GILCHRIST, C. J. The act of November, 1844, requires the commissioners "to assess the damages sustained by the owners of land." Whether the commissioners take into consideration all the circumstances proper to be adverted to by them, depends on their attention to the subject, and their capacity to come to a correct conclusion. But the result they reach is conclusive upon the party, unless there be an appeal from their decision. This is plainly the intent of the statute, for the institution of this tribunal would be useless, unless their estimate should be regarded as final. Any other view of the question would lead to great practical difficulties; for if we might go behind their assessment, it would be impossible to draw any line beyond which we should not proceed. There would be scarcely any injury a land-owner could sustain which might not be said, with more or less plausibility, to be one which the commissioners did not take into consideration. They are not bound to specify each injury and the sum awarded for it, and thus enable us to ascertain in what manner and upon what grounds their judgment has been made up, and when this is not done, it is obviously impossible for the court to say that for this or that special injury the land-owner has received no compensation. To require this of them would take from them all power of action as an independent tribunal. It would not permit them to exercise their own judgment without any supervision over the merits of a case, as the statute

intended, unless where an appeal has been interposed; but would compel them to be interrogated, and in a manner cross-examined, as to the mode in which they had discharged their duties. Having the power to consider all the injuries the owner has sustained, and having made an assessment, the presumption is that they have done their duty, and have considered all matters worthy of their attention.

It is a well-settled principle in this state, that when the legislature has authorized an act, the necessary and natural consequence of which is damage to the property of another, and at the same time has prescribed the particular mode in which the damage shall be ascertained and compensated, he who does the act cannot be liable as a wrong-doer: *Lebanon v. Olcott*, 1 N. H. 339; *Woods v. Nashua Mfg. Co.*, 4 Id. 527. Both these cases were actions on the case for erecting dams, and causing injury thereby to the respective plaintiffs, and in each of them damages were awarded by a committee designated in the charter of incorporation, and the position above stated was not denied by the plaintiffs.

If we were to consider the remedy by the award of the commissioners as merely cumulative, we should defeat the manifest object of the legislature, which was not to give an additional remedy to the party injured, but to substitute one proceeding for another, in the first instance; and this mode of indemnity was supposed to be more convenient than the other and usual remedy at common law. In other states, the decisions have been similar to those in this state: *Stevens v. Middlesex Canal*, 12 Mass. 466. In the case of *Steele v. Western Inland Co.*, 2 Johns. 283, the legislature authorized the defendants to dig a canal through the property of individuals, and provided for the appointment of appraisers to assess the damages. The plaintiff brought an action on the case against the defendants to recover damages, among other things, for the injury occasioned by stopping up his cross-ditches and drains. But it was said by Mr. Justice Thompson, that this must necessarily have been taken into consideration in the appraisement of the damages and compensation to be made the plaintiff in the first instance. "The law required the appraisers to ascertain the value of the land, and the damages sustained by the owner in consequence of the appropriation of it to the use of the company. The injury on this score was inseparable from the very act of making the canal, and not occasioned by any neglect of a duty enjoined by law."

There is nothing in the present case to show that the damage complained of was not the necessary consequence of a lawful act. That the commissioners could not probably have anticipated, as a matter of fact, the cutting off the stream of water in the place excavated for the railroad, and the consequent injury to the plaintiff, may be an argument against the expediency, but not against obligation of the law in question. As it does not appear that the cuttings and excavations were not made in a proper and reasonable manner, we think the action cannot be maintained upon these facts.

Verdict set aside.

ASSESSMENT OF DAMAGES BY COMMISSIONERS FOR TAKING PRIVATE PROPERTY FOR PUBLIC USE IS CONSTITUTIONAL, and trial by jury is unnecessary: *Livingston v. Mayor etc. of New York*, 22 Am. Dec. 622, and note; *Beekman v. Saratoga & S. R. R.*, Id. 679; *Scudder v. Trenton etc. Co.*, 23 Id. 756; *Williard v. Hamilton*, 30 Id. 195; *Bloodgood v. Mohawk & H. R. R.*, 31 Id. 313, and note; *Hickox v. City of Cleveland*, 32 Id. 730; *Backus v. Lebanon*, 35 Id. 466, and note.

KIND OF COMPENSATION REQUIRED TO BE MADE: *Bloodgood v. Mohawk & H. R. R.*, 31 Am. Dec. 313, and note.

RESULTING BENEFITS TO OWNER OF PROPERTY TAKEN FOR PUBLIC USE MAY BE CONSIDERED: *Livingston v. Mayor etc. of New York*, 22 Am. Dec. 622; *Whiteman's Executrix v. Wilmington & S. R. R.*, 33 Id. 411; *Jacob v. City of Louisville*, Id. 533; *Symonds v. Cincinnati*, 45 Id. 529, and note, considering this and the contrary doctrine.

INJURED PARTY IS CONFINED TO HIS STATUTORY REMEDY FOR DAMAGES, where a statute authorizes the doing of certain acts, and provides a remedy for the recovery of damages occasioned thereby: *Hickox v. City of Cleveland*, 32 Am. Dec. 730, and note; *Calving v. Baldwin*, 21 Id. 168, and note; and the following cases, in all of which the principal case is cited: *Troy v. Cheshire R. R.*, 23 N. H. 99; *Henniker v. Contoocook Valley R. R.*, 29 Id. 152; *Lindell's Adm'r v. Hannibal etc. R. R.*, 36 Mo. 545; *Daniels v. Chicago etc. R. R.*, 35 Iowa, 135; *Butman v. Vermont Cent. R. R.*, 27 Vt. 504. In *Emery v. Bradford*, 29 Cal. 87, it was held that the remedy of an owner of a lot in San Francisco, assessed for work on a street in front of the same, if dissatisfied with the decision of the superintendent of streets that the contractor has fulfilled his contract, is an appeal from such decision to the board of supervisors; and by neglect to appeal, he acquiesces in the approval of the work by the superintendent, and the determination is conclusive. In *Calving v. Baldwin*, *supra*, a distinction is made between acts authorized by private and public statutes, it being held that if, by the former, compensation may be obtained through the remedy given by it, or by action according to the common law. A party will be remitted to his common-law remedy for recovery of damages occasioned by a public use, authorized by the legislature, where the legislature fails to provide a remedy for the injury: *Hooker v. New Haven & N. Co.*, 36 Am. Dec. 477; note to *Hickox v. City of Cleveland*, 32 Id. 734. Report of commissioners, whether can be attacked for error or fraud of commissioners: Note to *In the Matter of Anthony Street*, Id. 610.

DAMAGES ASSESSED BY COMMISSIONERS PRESUMED TO INCLUDE those for all injuries, the proper subject of award: *Johnson v. Atlantic etc. R. R.*, 35 N. H. 571; *Eaton v. Boston etc. R. R.*, 51 Id. 507; and see also *Slatten v. Des Moines etc. R. R.*, 29 Iowa, 155; *Rowe v. Addison*, 34 N. H. 313. In *Pontiac v. Carter*, 32 Mich. 173, it was held that all possible damages as a subsequent change of grade, for taking private property for a public street, are covered by the award, except such as may result from an improper or negligent construction of the work, or from an excess of authority in its construction. In all the foregoing the principal case was cited.

PARTY, WHETHER LIABLE AS WRONG-DOER WHERE ACTS ARE AUTHORIZED.—Surveyors of highways, and others who act under them, are not liable for acts properly done within the scope of their authority, but they may be liable for wanton or malicious acts: *Rowe v. Addison*, 34 N. H. 313; *Waldron v. Berry*, 51 Id. 141; and to the extent of the powers and rights acquired by a railroad under the laws, and within their proper scope, neither the railroad, nor the contractors, nor the workmen under them, can be regarded as trespassers or wrong-doers: *Clark's Adm'x v. Hannibal etc. R. R.*, 36 Mo. 222, all citing the principal case.

THE PRINCIPAL CASE WILL BE FOUND RE-REPORTED in 1 Am. Rail. Cas. 206.

GIBSON v. POOR.

[21 NEW HAMPSHIRE, 440.]

UNDISPUTED CORRESPONDING LINE IS COMPETENT EVIDENCE to settle a line in dispute.

PLAN OR SURVEY WITHOUT DATE may be admitted in evidence.

ANCIENT DOCUMENT MAY BE READ IN EVIDENCE when absence from its proper place is satisfactorily accounted for and suspicions against its genuineness removed.

GENUINENESS OF ANCIENT TOWN PLAN WITHOUT DATE may be shown by evidence that a town clerk of more than thirty years before, from whom it was obtained, had then kept it among the records, and that its draftsman had previously been appointed to survey the town.

TRESPASS for breaking and entering the plaintiffs' close and carrying away a quantity of wood and timber. The *locus in quo* was claimed by both parties, the defendant contending that it was a part of lot No. 6, in the twelfth range of lots in Goffstown, and the plaintiffs claiming that it was a part of lot No. 5, in the same range. There was no dispute between the parties in regard to the position of the line dividing lots 5 and 6, in the thirteenth range, adjoining the twelfth range on the east; and it appeared that if this line in the thirteenth range was continued westward through the twelfth range, the line between lots 5 and 6 of the latter range would fall as the defendant claimed. The defendant introduced several witnesses who had examined the line in the thirteenth range and found

it to be well established; and after running on the continuation of this line for some distance in the twelfth range, several trees marked as line trees, with apparently old marks, were found. This, and other evidence tending to show where the true line was, was excepted to as incompetent by the plaintiffs, but was admitted. A plan of the town, obtained from the town clerk's office, where it had been for a number of years among the town records, was offered by the defendant; but it appearing to be only a copy, it was withdrawn. The records of the proprietors of Goffstown, showing that one Patten and another person had many years before been appointed to survey the town into lots, were next offered by the defendant, who then also offered an ancient and much worn plan, purporting to be made by Patten, but bearing no date. The plan had been obtained from Gilchrist, a surveyor, still living, but aged and feeble, and was the one from which the copy above offered had been taken. Gilchrist had been town clerk of Goffstown more than thirty years before, and had then kept the plan among the town records, where it was frequently examined by the inhabitants of the town, but it did not appear how it had become separated from the records. To the competency of this evidence and the admission of the plan the plaintiffs excepted, but the exception was overruled. A verdict having been returned for the defendant, the plaintiffs moved to set the same aside, and for a new trial, for error in the rulings of the court.

D. Clark, for the plaintiffs.

W. C. Clarke, for the defendant.

By Court, EASTMAN, J. It is believed to be a well-settled principle that lines, monuments, and boundaries which are established and undisputed, although not immediately connected with the land in controversy, are nevertheless proper and competent evidence to be considered by a jury, whenever they tend to elucidate the subject in dispute. The manner in which the lands of this country were originally surveyed and occupied, has rendered such kind of evidence oftentimes the most satisfactory in ascertaining the true line between adjoining lots, or the line adopted and recognized as true by the original settlers. Mr. Greenleaf, in his work on evidence, remarks that by far the greatest portion of our territory was originally surveyed in large masses, or tracts, owned either by the state, or by the United States, or by one or a company of proprietors; under whose authority these tracts were again surveyed

and divided into lots suitable for single farms, by lines crossing the whole tract and serving as the common boundary of very many farm lots lying on each side of it. So that it is hardly possible to prove the original boundaries of one farm without affecting the common boundary of many: 1 Greenl. Ev., sec. 145, note. The remarks apply in their full force to the original survey of lands in this state. Proprietors of tracts and townships held their meetings, appointed their surveyors, run out their lands, made plans and maps of the same, drew their rights, and made conveyances when deemed necessary. These records and plans are the source of most of the titles to real estate within our limits; and when properly verified, are always received in evidence in all matters to which they refer. Such is the constant practice of the courts in this state, and such is also the general practice of most other jurisdictions. Records of original proprietors, their plans and maps, the location of lands by the ancient settlers, and all evidence, whether documentary or parol, which bears upon the point at issue and is not inadmissible upon general principles, is received in cases of disputed boundary. In *Smith v. Prewit*, 2 A. K. Marsh. 158, it is said that boundary may be proved by every kind of evidence which is admissible to establish any other fact; and where the boundary is ancient, even reputation is admissible. To the same effect are *Doe ex dem. Taylor v. Roe*, 4 Hawks, 116; *Smith v. Nowells*, 2 Litt. 159; *Ralston v. Miller*, 3 Rand. 44 [15 Am. Dec. 704]. In some respects, courts have gone further in breaking over established principles of evidence upon this subject than upon almost any other. Hence, hearsay, not amounting to tradition or general reputation, but from a single individual, is received upon this subject. Some courts confine this description of evidence to boundaries of parishes and such tracts as are of general and public interest, while others admit it in all controversies, whether pertaining to public or private rights. The English rule confines it to matters of public and general interest, and the same rule is adopted in some of the United States; while in other states, the evidence is fully admitted without regard to the nature or character of the tract in dispute, or the parties interested therein. Among the numerous authorities bearing upon this matter may be enumerated *Boardman v. Reed*, 6 Pet. 341; *Buchanan v. Moore*, 10 Serg. & R. 281; *Jackson ex dem. McDonald v. McCall*, 10 Johns. 377 [6 Am. Dec. 343]; *Speer v. Coate*, 3 McCord, 227; *Wooster v. Butler*, 13 Conn. 809; *Weems v. Disney*, 4 Har. & M. 158. In this state the

rule is, that statements of deceased individuals, who from their situation had the means of knowledge and no interest to misrepresent, are admissible: *Shepherd v. Thompson*, 4 N. H. 213. The practice under this decision has been, not to limit the evidence to subjects of general interest, but to extend it to all matters of boundary, whether pertaining to public tracts or private rights.

In addition to these general principles, and others that might be commented upon, which run through all the authorities, there are some decisions which bear more directly upon the precise questions raised in this case. In *Den ex dem. Tate v. Southard*, 1 Hawks, 45, it was held that the lines of the surrounding tracts, if made for those tracts alone, might be received as competent to show the line of the particular tract in dispute. *Rockwell v. Adams*, 6 Wend. 467, was an action of trover brought for the conversion of certain saw-logs; and the question between the parties was as to the line between their lots; the plaintiff owning on the south, and the defendant on the north; the land of both being a part of a patent or tract of two thousand acres. It appeared that the land east and west of that in dispute was owned by the defendant and other individuals, and the plaintiff was permitted to introduce evidence to show that they occupied up to a line corresponding to the one claimed by him. He was also permitted to prove that the settlers on a patent adjoining this one of two thousand acres, had taken possession and occupied up to the line which he claimed. The evidence in both particulars was excepted to, but the case being carried to the supreme court, it was all held admissible. With regard to the evidence as to the possessions of the settlers in the adjacent patent, the court remarked that it was properly received, and that if an erroneous location had been made, which would be disturbed by extending the defendant's line, considerations of public policy forbade that such errors should be thus corrected, where the consequence would be a corresponding change in the possessions of the whole neighborhood. Taking the doctrine of this last case to be law, there can be no doubt of the admissibility of the evidence as to the line between lots 5 and 6 in the thirteenth range, nor that it had a direct tendency to fix the line as claimed by the defendant. The decision goes further, as does also *Den ex dem. Tate v. Southard*, *supra*, than it is necessary to go, in holding the evidence referred to in this case to be admissible.

The evidence in regard to the plan found in the possession of Gilchrist was also competent to be considered. Had this plan

been produced from among the records of the town clerk, having been received by him from his predecessor in office, there would probably have been no question made respecting it; for notwithstanding it is without date, yet being ancient and made by Patten, and the records showing that Patten with another was appointed to survey the town into lots, the whole current of authorities sustains its admissibility: *Chapman v. Cowlan*, 13 East, 10; 1 Phill. Ev. 418, 481; *Earl v. Lewis*, 4 Esp. 1; *Rancliffe v. Parkyns*, 6 Dow, 202; *Hewlett v. Cock*, 7 Wend. 374; *Jackson v. Luquere*, 5 Cow. 225; *Jackson v. Laroway*, 3 Johns. Cas. 283; 1 Greenl. Ev., sec. 142. The want of date cannot be regarded as very material. A plan or survey is not a paper requiring any formal date, and in very many instances it is not dated. It is unlike many instruments, where the date forms an essential part of the paper. A date to a plan may, in some instances, when taken in connection with other facts, add weight to its character as evidence, but as a general thing it cannot be essential. Even the date to a deed is regarded as formal. It does not always show the true time of delivery, and can be contradicted: *Lee v. Massachusetts Fire Ins. Co.*, 6 Mass. 208; *Maynard v. Maynard*, 10 Id. 456 [6 Am. Dec. 146]; *Jackson ex dem. Hardenberg v. Schoonmaker*, 2 Johns. 230. If there is no date to a will, the true time of its execution may be shown, or it may be shown that there is a mistake in the date: *Deakins v. Hollis*, 7 Gill & J. 311.

The reason why it is required that an ancient document shall be produced from the proper depository is, that thereby credit is given to its genuineness. Were it not for its antiquity, and the presumption that consequently arises that evidence of its execution cannot be obtained, it would have to be proved. It is not that any one particular place of deposit can have more virtue in it than another, or make that true which is false; but the fact of its coming from the natural and proper place tends to remove presumptions of fraud, and strengthens the belief of its genuineness. It may be false, and so shown, notwithstanding the presumptions in its favor. If found where it would not properly and naturally be, its absence from the proper place must be satisfactorily accounted for; but that being done, and all suspicions against its genuineness removed, we can discover no reason why it may not be read in evidence. The real question which is to affect its consideration with the jury is, whether the instrument offered is genuine, and contains a true statement of what it purports to.

In *Bishop of Meath v. Marquis of Winchester*, 3 Bing. N. C. 183, Tindal, C. J., speaking of ancient documents, holds this language: "It is not necessary that they should be found in the best and most proper place of deposit. If documents continued in such custody, there never would be any question as to their authenticity; but it is when documents are found in other than their proper place of deposit that the investigation commences, whether it was reasonable and natural under the circumstances in the particular case to expect that they should have been in the place where they are actually found; for it is obvious that while there can be only one place of deposit strictly and absolutely proper, there may be many and various that are reasonable and probable, though differing in degree; some being more so, some less; and in those cases, the proposition to be determined is, whether the actual custody is so reasonably and probably accounted for that it impresses the mind with the conviction that the instrument found in such custody must be genuine." Some authorities hold that the antiquity of the document is alone sufficient to entitle it to be read, and that the other circumstances only go to its effect in evidence: 2 Poth. Ob. App. 16, sec. 5, p. 149; see also *Jackson v. Laroway*, 8 Johns. Cas. 283; *Doe v. Burdett*, 4 Ad. & El. 1.

Gilchrist, in whose possession this plan was found, had been town clerk of Goffstown more than thirty years ago; and when such clerk, the plan was kept among the records of the town, and was frequently examined by its inhabitants. This fact, taken in connection with the records of the proprietors, tends strongly to show its genuineness. At that time it would probably have been received in evidence, without exception. The copy first produced on the trial, having been among the records of the town for a number of years, may very likely have been made by Gilchrist himself, as a substitute for this ancient one, which had become much worn by use; and Gilchrist, on leaving the clerk's office, may have taken the ancient one, as valueless, and left the copy as the one usually examined; or he may have borrowed the ancient one, for some purposes of surveying.

But however it may have become separated from the records, there are facts enough connected with it, from which to find its genuineness as the original plan, and that being established, no further question arises upon it. Even if this ancient plan had not been found, we are not prepared to say that the copy presented could not have been used. Ancient plans must at some time become worn out by age and use; and the necessity

of the case seems to require that their place be supplied by copies. After these copies have been kept among the records, and used by the inhabitants a sufficient number of years to raise the ordinary presumption of genuineness, can they not be used as substitutes for the originals, without resorting to proof of being true transcripts, if the originals cannot be found, or have become defaced and unintelligible by use? If the originals should be lost, there would be no doubt of the competency of the copies as secondary evidence, and the reason would seem to be quite as cogent for the admission of copies after the originals had become defaced by age and use.

The object of courts and juries, in all their investigations, is to elicit the truth, and in so doing to have recourse to the most satisfactory sources of evidence within their power. Holding this plan to be a true index to the boundaries and the location of the lots in this town, we think that, taken in connection with the marked trees between lots 5 and 6 in both ranges, there cannot be any doubt of the correctness of the verdict in this case, nor any doubt that the evidence showing the marked trees was admissible. The lines in the plan run through the whole tract, whether they be traced between the ranges, or between the corresponding numbers in the several ranges. They were evidently all established at the same time; and the marked trees between lots 5 and 6 in the thirteenth range, about which the parties do not differ, corresponding with those found in the twelfth range, we regard the evidence received as not only competent but highly satisfactory, and tending strongly to fix the true line between the parties.

Entertaining these views, it is the opinion of the court that there should be judgment on the verdict.

LINE MARKED PART OF DISTANCE must be followed in the same direction for the whole distance, unless there is some marked corner to divert it: *Thornberry v. Churchill*, 16 Am. Dec. 125.

ANCIENT PLAT, WHEN INADMISSIBLE IN EVIDENCE: *Budd v. Brooks*, 43 Am. Dec. 321.

ANCIENT DEED, WHEN ADMISSIBLE IN EVIDENCE WITHOUT PROOF OF EXECUTION: Note to *Jackson v. Blanshan*, 3 Am. Dec. 490; *Roberts v. Stanton*, 5 Id. 463; *Jackson v. Davis*, 15 Id. 451; *Crane v. Marshall*, 33 Id. 631.

THE PRINCIPAL CASE IS CITED in *Whitehouse v. Bickford*, 29 N. H. 480, as giving the reasons of the rule that the genuineness of a plan, when found in the proper custody, was sufficiently proved to entitle it to go to the jury as evidence of such facts as it was competent to prove. It was also referred to in *Adams v. Stanyan*, 24 Id. 416, as being a case where the question of the admissibility of ancient maps and records to show boundaries was somewhat discussed.

BROWN v. MANTER.

[21 NEW HAMPSHIRE, 528.]

"PREMISES" IN DEED MEANS ALL THAT PRECEDES HABENDUM.

HABENDUM'S OFFICE IS NOT TO GRANT ESTATE, but to limit its certainty.

NOTHING CAN BE LIMITED IN HABENDUM which has not been given in the premises.

INSTRUMENT VOID AS CONVEYANCE when containing a description in the premises and an *habendum*, but no words of grant, so far as regards the operative power of the premises and *habendum*.

COVENANT OF WARRANTY MAY OPERATE AS ESTOPPEL BY WAY OF REBUTTER, where an instrument, void as a conveyance for want of words of grant, contains such covenant, with the names of covenantor and covenantee, and a description of the land.

TRESPASS *quare clausum fregit*. The defendant claimed under what purported to be a conveyance of the *locus in quo* from Mrs. Nichols to Silas Sweet and Lemuel Call, as follows: "I, Hannah Nichols, etc., in consideration of the sum of one hundred dollars paid to me by Silas Sweet, etc., their heirs and assigns forever, all the right, title I have to a certain piece of land [describing it]. To have and to hold the premises to them, the said Silas and Lemuel, their heirs and assigns forever, hereby engaging to warrant the same to them and their heirs and assigns against all persons claiming by, from, or under me, my heirs and assigns." This instrument was excluded, the court holding that it conveyed no interest, since there were no words of grant. It appears that Mrs. Nichols was a party to this action. A verdict was taken for the plaintiff, upon which judgment was to be rendered, or it was to be set aside and a new trial granted.

Pillsbury, for the plaintiff.

Porter, for the defendant.

By Court, GILCHRIST, C. J. The numerous decisions to be found in the books, both in the early and modern days of the common law, relating to the construction of deeds, and to the effect to be given to the various parts of which they are usually composed, have established certain rules about which there is no controversy. The courts are anxious so to construe a deed as to give effect to the intent of the parties, if it do not contravene any fundamental rules of the law; and the construction is to be made upon the entire deed: *Webster v. Atkinson*, 4 N. H. 21; *Clanrickard v. Sidney*, Hob. 277. And "by the word 'intent,' is not meant the intent of the parties to pass the land by this or that particular kind of deed, or by any particular

mode or form of conveyance, but the intent that the land shall pass at all events one way or the other:" Lord Chief Justice Willes, in *Roe v. Tranmer*, 2 Wils. 78; *Shove v. Pincke*, 5 T. R. 129; *Solly v. Forbes*, 2 Brod. & B. 38; *Evans v. Vaughan*, 4 Barn. & Cress. 261.

The technical meaning of "the premises" in a deed is all that precedes the *habendum*: Shep. Touch. 75; Co. Lit. 6, 7; *Sumner v. Williams*, 8 Mass. 174 [5 Am. Dec. 83]. This is a simple and concise, but a perfectly accurate, definition. The office of the *habendum* is not to grant the estate, but only to limit its certainty: Co. Lit. 6 a; *Buckler's Case*, 2 Co. 55; *Earl of Shrewsbury's Case*, 9 Id. 47 b; Com. Dig., Fait, E, 9. But the *habendum* cannot enlarge the premises: Id., E, 10. Nothing can be limited in the *habendum* of a deed which has not been given in the premises, because the premises being that part of a deed in which the thing is granted, it follows that the *habendum*, which is only used for the purpose of limiting the certainty of the estate, cannot increase the gift, for in that case the grantee would in fact take a thing which was never given to him: 4 Cru. Dig., tit. 32, c. 20, sec. 73. But if a thing is comprehended in the premises, and has another name in the *habendum*, the *habendum* is good: Id., sec. 74. And it is held in *Manning v. Smith*, 6 Conn. 289, that the *habendum* never extends the subject-matter of the grant.

A distinction is made, as to the effect of the *habendum*, between deeds in which the premises expressly mention an estate or interest, and those in which the premises merely describe the tenements, but do not mention any estate or interest. This distinction is thus stated by Abbott, C. J., in *Goodtitle v. Gibbs*, 5 Barn. & Cress. 709. If no estate be mentioned in the premises, the grantee will take nothing under that part of the deed, except by implication and presumption of law; but if an *habendum* follow, the intention of the parties as to the estate to be conveyed will be found in the *habendum*, and, consequently, no implication or presumption of law can be made; and if the intention so expressed be contrary to the rules of law, the intention cannot take effect, and the deed will be void. On the other hand, if an estate and interest be mentioned in the premises, the intention of the parties is shown, and the deed may be effectual without any *habendum*, and if an *habendum* follow which is repugnant to the premises, or contrary to the rules of law, and incapable of a construction consistent with either, the *habendum* shall be rejected, and the deed stand good upon the premises.

Now, in the present case, a tract of land is described in the premises, but it is not granted. So far as the premises are concerned, it remains in the person who executed the deed. The *habendum* can have no effect upon an estate which is not granted at all. It cannot of itself convey an estate, for that would be contrary to the rules of law, and to make the instrument effectual as a conveyance of land, the *habendum* must be regarded as a grant of the land. This we cannot do without striking out a new path, independent of the authorities, and that, of course, we have no right to do. The instrument, then, must be regarded as containing merely a description of land, and is void as a conveyance so far as regards the operative power of the premises and the *habendum*.

There is, however, a case, that of *Bridge v. Wellington*, 1 Mass. 219, in which an instrument similar to that now under consideration was held sufficient to pass a fee. It was in these words: "Know all men, etc., that I, J. B., in consideration of, etc., to me paid by, etc., a certain tract of land in L." (describing it). *Habendum* to John Bridge, in fee. The instrument then contained a covenant of warranty of the granted premises. The court held that taking the whole deed together it was not possible to doubt as to the intention to pass the estate in fee, and that they found no rule of law to prevent their carrying that intention into effect. The learned editor of the Massachusetts reports says, however, of this case: "But *quod voluit non dixit*; the deed was clearly void." With this opinion of the editor we agree entirely, so far as regards the premises and the *habendum*, for reasons which we have stated above. We think the rule of law, that where no estate is conveyed by the premises it cannot pass by the *habendum*, stands in the way of the decision, upon the ground on which it is placed by the court. Nor do we think the authorities cited at the bar sustain the decision. The court say: "The authorities cited justify us in saying that the deed is sufficient to convey the estate in fee." The authorities are *Spyve v. Topham*, 3 East, 115; *Lord Say and Seal's Case*, 10 Mod. 40; *Eeles v. Lambert*, Al. 41. Of these we have been able to see only *Spyve v. Topham*. In that case the words in the premises were "to J. Topham" and "his heirs and assigns," and those in the *habendum* "to G. Bass," "his heirs and assigns." The deed was a release, and the lease for a year was to G. Bass. In the release Bass was described as a trustee for Topham. The words "J. Topham," in the premises, were obviously a clerical error. If effect had been

given to them, nothing would have passed to any one by the release, and the whole object of the parties would have been defeated. The court held that the words "unto the said J. Topham" might be rejected as surplusage. Now, it is very obvious that there is a wide difference between rejecting as surplusage a part of a deed which makes the rest unintelligible and inserting something which the party has not placed there. In the one case, the whole deed is construed by its own language, which is consistent with the rule. In the other case, something is added upon the presumption of a mistake, which is contrary to the known rule of law, which does not permit a deed to be thus rectified. Such a remedy must be sought in chancery.

In the case of *Bustard v. Coulter*, Cro. Eliz. 903, it was held that a bargain and sale by indenture, without expressing to whom, although it were *habendum* to W. Gregory, who was a party to the deed, was not good, "because there ought to be grantor and grantee in the premises of the deed." Shep. Touch. 75, *contra*; and the learned editor of the last edition of the Touchstone seems to consider the point as settled by *Spyve v. Topham* in favor of the validity of the grant. But Lord Denman, in *Doe v. Steele*, 4 Ad. & El., N. S., 663, says of *Spyve v. Topham*: "The case was determined upon the peculiar circumstances of it, and is no rule for any case not precisely like it." Sheppard goes on to say: "And yet if the thing granted be only in the *habendum* and not in the premises of the deed, the deed will not pass it," on which the editor remarks: "Probably this proposition is too general." But Sheppard proceeds: "And therefore if a man grant Blackacre in the premises of a deed, *habendum* Blackacre and Whiteacre; Whiteacre will not pass by this deed," upon which the editor makes no comment, and which we understand to be consistent with the rules regulating the construction of the premises and *habendum*. We therefore respectfully dissent from the decision of *Bridge v. Wellington*, 1 Mass. 219, and do not think that the instrument in this case conveys any interest in the land by virtue of the *habendum* or of the premises.

But the instrument contains the names of the covenantor and of the covenantees. It declares the receipt of a pecuniary consideration. It contains the description of a tract of land, and the covenantor for herself and her heirs covenants to warrant the land to the covenantees and their heirs against all persons claiming under her and her heirs. Now, this covenant operates as an estoppel by way of rebutter to prevent circuitry

of action. If the covenantees should bring a writ of entry against the covenantor to recover possession of the land, she would be estopped from setting up her title to it, because if she were to do so the covenantees would be entitled to an action on the warranty to recover the value of the land. The principle of estoppel, therefore, in its application to this case, would prevent multiplicity of suits and administer justice. Circuity of action is where a recovery in the first suit alone gives rise to the second: *Haynes v. Stevens*, 11 N. H. 88.

In the case of *Kimball v. Blaisdell*, 5 N. H. 533 [22 Am. Dec. 476], Brown, owning land, conveyed it to Burley, who gave Brown a bond to reconvey the land, upon the payment of two hundred dollars. Brown afterwards conveyed the land to the demandant, with a warranty against all claims under himself. Subsequent to this, the demandant having the bond given by Burley, paid to Burley the sum due, and took a deed from Burley of the land in the name of Brown. The tenant's title was by an execution which he had extended upon the land as the property of Brown. Brown had no title when he conveyed to the demandant, but it was held that the title which subsequently accrued in his name inured to the benefit of the demandant by force of the warranty, which bound the tenant who claimed under Brown as a privy in the estate. But the present case is more simple. Mrs. Nichols being a party, and her covenant binding parties and privies, it is not necessary that she should acquire any subsequent title, which should inure to the benefit of the covenantees, for she would be rebutted by her own covenant: *Bates v. Norcross*, 17 Pick. 14 [28 Am. Dec. 271]; *Terrett v. Taylor*, 9 Cranch, 43. The land does not pass by force of the warranty or of the estoppel, although a rebutter is called a kind of estoppel: Co. Lit. 352 b. But this merely relates to the similar operation of a warranty and an estoppel, in repelling the party to whom they attach from recovering in opposition to them the estate warranted. In *Bates v. Norcross*, *supra*, the demandant, who had married the heiress of a grantor to whom assets real had descended from her ancestor, was rebutted, by a warranty in the grant, from recovering by title paramount the land granted. The warranty took effect where, from the absence of all privity, an estoppel would not have been binding.

It would be easy to multiply authorities on this subject, but it is unnecessary to say more than that the covenant operates as an estoppel by way of rebutter to prevent circuity of action.

The instrument, therefore, should have been admitted in evidence.

Verdict set aside.

PREMISES OF DEED INCLUDE EVERYTHING THAT PRECEDES HABENDUM, and it is in the premises that the thing is really granted: *Budd v. Brooks*, 43 Am. Dec. 321.

LIMITATION IN HABENDUM CONFLICTING WITH ESTATE GIVEN IN PREMISES of deed must be rejected, and the estate given in the premises must prevail: *Budd v. Brooks*, 43 Am. Dec. 321. The *habendum* of a deed is void if repugnant to the estate granted in the premises; but an estate conveyed in the premises is not divested by the fact that another and different grantee is named in the *habendum*: *Hafner v. Irwin*, 34 Id. 390.

THE PRINCIPAL CASE IS CITED IN *Thompson v. Banks*, 43 N. H. 540, to the point that a covenant cannot enlarge a grant, and cannot operate as a conveyance of any more land than was contained in the demise, yet it might operate, in order to avoid circuity of action, by way of estoppel, and in that way the covenantor might be estopped to claim additional land or privilege, though not contained in the demise, if it was clearly covered by the covenant.

WHITNEY v. SWETT.

[22 NEW HAMPSHIRE, 10.]

NO ESTATE IN LAND CAN BE CONVEYED WITHOUT WRITING, except an estate at will.

PROOF OF TENANCY BY YEARLY RECEIPTS FOR RENT shows but a lease at will.

TENANT HAVING NOTICE TO QUIT BECOMES TRESPASSER IF HE REMAINS ON the premises.

LESSOR MAY PEACEFULLY REMOVE TRESPASSING TENANT'S GOODS to a convenient distance, doing them no unnecessary damage.

ABUSE OF AUTHORITY IN REMOVING TRESPASSER'S goods renders one a trespasser himself *ab initio*.

WHETHER GOODS WERE REMOVED IN IMPROPER MANNER is a question for the jury.

WHETHER WORDS WERE SPOKEN BY ONE AS AGENT OR IN HIS OWN BEHALF is a question of fact for the jury.

TRESPASS for expelling plaintiff from his house, and throwing his furniture out of doors. Plea, general issue, with allegation of ownership of house by defendant, denying plaintiff's actual possession, and alleging a careful removal of the furniture. Defendant owned the premises, but had leased them to plaintiff. There was no written lease, and plaintiff relied on certain quarterly receipts for rent to establish a lease of the premises for a year. One receipt was: "Exeter, 19 March, 1847. Received of Aaron Whitney, one quarter's rent of house occupied by him to this date, at seventy-five dollars per annum. (Signed) S. B. Swett." Rent was due September

19th, was demanded, not paid, and on October 11th plaintiff was notified to quit on the twentieth. Head, one of plaintiff's witnesses, testified that defendant desired security for rent from plaintiff, or he would not let him occupy the house. Witness said he (witness) would engage that the plaintiff should give security, whereupon defendant said, "Very well." It does not appear that any security was in fact given. The court left it for the jury to find whether Head became security for the rent, or acted only as plaintiff's agent. The jury returned a verdict for the plaintiff. Defendant appealed.

Wells and Christie, for the plaintiff.

Marston and Emery, for the defendant.

By Court, BELL, J. No estate or interest in lands can be created or conveyed without writing, but an estate at will: N. H. R. S., c. 130, sec. 12. It is therefore immaterial how the existence of a tenancy is shown, whether by parol evidence, or by written instruments, as receipts for rent, or the like; the right of the tenant, whatever might seem to be the actual contract of the parties, is nothing but a tenancy at will unless it can be shown that some other or higher interest or estate, as a tenancy for life or years, was created or conveyed by writing. The ruling of the court was therefore correct, that, in the absence of any writing to create or convey another estate, the plaintiff's interest in the property in question was only that of a tenant at will.

The revised statutes, chapter 209, section 1, provide that "any lessor or owner of any lands or tenements may at any time determine any lease at will, by giving to the tenant a notice in writing to quit the same at a day therein named;" and by section 2, if any tenant or occupant neglects or refuses to pay the rent due and in arrear upon demand, seven days' notice shall be sufficient.

It appears, by the case, that the rent was payable quarterly; that a quarter's rent was due September 19, 1847, and was not paid; that it was demanded on the eleventh of October, and on that day a notice was given to the plaintiff to quit the premises on the twentieth of October. This was a sufficient notice, and the tenancy was by that notice terminated on the twentieth. After that day, the plaintiff was a trespasser; and his goods were damage-feasant, and the owner had a clear and perfect right to go into the house with suitable assistants; and there, peaceably and quietly, without breach of the peace, remove the goods to a near and convenient distance, and there leave

them for the use of the owner, doing them no unnecessary damage.

The power thus given by the law is one liable to great abuse, and therefore must be strictly pursued. A man may become a trespasser *ab initio*, not only by using an authority which the law gives him for improper purposes, or by pushing the exercise of it beyond due limits, but by exercising it in an illegal and improper manner to the prejudice of another: *Barrett v. White*, 8 N. H. 210 [14 Am. Dec. 352]; *State v. Moore*, 12 Id. 42.

There was evidence tending to show that the property in this case was removed in an improper manner; as, that the carpets were torn up without removing the nails, and that the goods were deposited in a place not suitable; as, beds upon the ground, etc. If this evidence was credited by the jury, the defendant was a trespasser without any legal justification, and the rule of damages given to the jury was the only one which ought to govern them.

The question arising upon the testimony of the witness Head was properly referred to the jury. By the notice of the eleventh of October, the plaintiff's tenancy would terminate upon the twentieth, but it was competent for the defendant to waive the notice, which would leave the parties in the same position as if no notice had been given.

Such waiver may be unqualified, or it may be conditional. If the defendant accepted Head's personal agreement to be surety for the rent, or to furnish security, that was an unqualified waiver. If Head was merely an agent of the plaintiff, doing his business, and speaking in his behalf alone, then the waiver, if any, was conditional; to take effect if the security was furnished in a reasonable time, and not otherwise. As there was no security in fact furnished, the agreement to waive the notice, if it was of this conditional character, fell to the ground.

In the way in which Head gave his evidence it was open to doubt which of these was the actual view of the parties. This doubt does not arise upon the meaning, the force, and construction of the language, for that it would be the duty of the court to interpret. But it depends upon the question whether the words are to be deemed the words of Head in his own behalf, or the words of the plaintiff alone, spoken for him by his agent. This question of fact depends not so much on the meaning of what was said, as on a just consideration of all the facts and circumstances in evidence bearing on the question of

Head's agency, and the intention and understanding of the parties as to what took place between them.

The case, so far as appears, having been properly and fairly tried, and the rulings and instructions of the court being correct and proper, there is no foundation for the motion to set aside the verdict.

Judgment for the plaintiff.

FOYE v. LEIGHTON.

[22 NEW HAMPSHIRE, 71.]

EVIDENCE OF SEPARATE INTERESTS OF PARTIES IN BUSINESS.—Evidence of the manner of doing business is competent as tending to show that the interests of the parties in the business were separate and that no partnership existed.

EVIDENCE TO BE REBUTTING MUST APPLY DIRECTLY to the matter in controversy, should disprove the particular facts attempted to be shown by the other side, and must not introduce new matter.

EVIDENCE OF OPPOSITE USAGE OR CUSTOM is not admissible to rebut a particular fact attempted to be proved by the opposite party.

EVIDENCE THAT IN SIMILAR BRICK-YARDS the business is jointly carried on is not competent to prove that it is so in any particular one.

PROPER OFFICE OF EVIDENCE OF CUSTOM OR USAGE is to assist in ascertaining the intent of the parties.

ASSUMPT for labor and services. Plea, general issue. Before the suit was commenced, but after the services had been rendered, one of the defendants who had denied the joint liability had bought out the other defendant, and had agreed to pay plaintiff. The court told the jury that the subsequent purchase and sale between defendants could not affect the joint liability, but they might bear the circumstance of the purchase in mind in determining the fact of joint liability. Verdict for plaintiff, and defendant appealed.

Soule and Hale, for the defendants.

Christie, for the plaintiff.

By Court, **EASTMAN, J.** The defendants offered evidence showing the manner in which the business was conducted in the brick-yard where the plaintiff labored, as tending to show that their interests in the business were separate and that they were not in partnership.

This was competent. The manner of doing business in a brick-yard, and preparing the brick for use and market, admits of a division of labor and of separate interests. One party may get out the clay, another may prepare the bricks ready for the

kiln, and a third may superintend the burning; and there may still be other divisions. Each may have his separate work and his separate interest in the business. And it was competent and proper for the defendants to go into the matter in evidence, for the purpose of showing how the facts were, and that no partnership existed between them.

In the same manner might merchants, doing business in the same store, show that the goods upon one side of the store belonged to one party, and those upon the other side to another; that their books were kept separately, their clerks hired by different individuals, and that their interests were distinct. Mechanics, also, might carry on different branches of the same business under the same roof, and yet have separate and distinct interests in the productions of their labor.

After the introduction of the defendants' testimony upon this point, the plaintiff was permitted to introduce evidence, subject to the defendants' exceptions, tending to show that the same method of conducting the business was adopted in other yards of similar extent, where the business was carried on by one person only, or jointly by two or more persons. It is said, in the argument, that this was introduced as rebutting testimony; and such, we presume, was the understanding at the trial. But we think its admission was erroneous, and that it could not be admitted upon that principle. The defendants, by showing the manner in which they carried on their business in that particular yard where the labor was performed, undertook to establish that they were not in partnership. They relied upon specific facts as showing how the truth was. The evidence, then, to be rebutting, should be confined to the transactions under consideration. It should disprove the particular facts attempted to be shown upon the other side, and should not consist of new matter. The plaintiff might, perhaps, show such a custom or usage prevailing in this kind of business as would override the facts, and be an answer to the position assumed by the defendants. But such testimony would be in the nature of new evidence. It could not be regarded as rebutting, for it would be raising a new issue not before under consideration. The defendants did not set up any usage. They relied upon no general custom as showing their true situation in business, but upon particular facts and specific transactions. The introduction of the evidence by the plaintiff showing a usage is striking out a new path, and assumes, for the first time in the case, that persons doing business in that manner in brick-yards are in partnership. Whether there be such a

usage is an issue of the plaintiff's raising, and has to be settled by the jury before it can have any weight in disproving the facts and position of the defendants that they are not in partnership. We cannot, therefore, regard the evidence as rebutting, and on that ground admissible, but as *res inter alios*, and incompetent.

Nor do we think it admissible to show a custom or usage. A usage explains and ascertains the intent of the parties. It cannot be in opposition to any principle of general policy, nor inconsistent with the terms of the agreement between the parties; for it incorporates itself into the terms of the agreement and becomes a part of it: *Hazard v. New E. Ins. Co.*, 1 Sumn. 223. It must be known and established: 1 Greenl. Ev., sec. 292, and cases cited. It must appear to be so well settled, so uniformly acted upon, and of so long a continuance, as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference to it, and in conformity with it: *Rushforth v. Hadfield*, 7 East, 225; *Paull v. Lewis*, 4 Watts, 402; *Snowden v. Warder*, 3 Rawle, 101; *Stoever v. Whitman*, 6 Binn. 416; *Smith v. Wright*, 1 Cai. 44 [2 Am. Dec. 162]; *Frith v. Barker*, 2 Johns. 335; *Wood v. Hickok*, 2 Wend. 501; *The Reeside*, 2 Sumn. 569; *Collings v. Hope*, 8 Wash. C. C. 150; *Christian v. Bowman*, 1 Hill (S. C.), 270; *Loring v. Gurney*, 5 Pick. 16; *Macomber v. Parker*, 13 Id. 182; *Eager v. Atlas Ins. Co.*, 14 Id. 143 [25 Am. Dec. 863]; *Leavitt v. Simes*, 3 N. H. 14.

The evidence offered, in order to be competent to establish a usage, must have a tendency to show that, in brick-yards, similar in extent to the one where this labor was performed, those carrying on the business (if more than one does it) are uniformly in partnership. It must have a tendency to show that such is the known and established usage; and that when individuals undertake to carry on the business of brick-making, in yards of this description, they must be presumed to understand the usage, and that they will be considered by the public and those doing business with them to be in partnership.

The evidence introduced was that in other yards of a similar extent with this, the same method of conducting the business was adopted, whether the business was carried on by one person only, or jointly by two or more persons. And this we cannot regard as having any tendency to establish a custom or usage, by which individuals in this kind of business are to be adjudged in partnership. It shows the manner in which the business is done; that it is carried on in the same

way whether more or less are engaged in it; but it can have no tendency to fix the existing contracts between the parties transacting the business, any further than it shall apply to the yard in regard to which the evidence is given. This position is not seriously controverted by the plaintiff's counsel, as we understand his argument.

The view which the court have taken of the admissibility of this evidence renders it unnecessary to examine the other exceptions raised in the case. This evidence having been erroneously admitted, the verdict must be set aside, and a new trial granted.

THE PRINCIPAL CASE IS CITED to the point that in the absence of a special agreement the parties are deemed to have contracted with reference to the established existing usage, in *Johnson v. Railroad*, 46 N. H. 221.

PENDERGAST v. MESERVE.

[22 NEW HAMPSHIRE, 109.]

CONTRACT TO BE PERFORMED WHEN ANOTHER'S WIFE SIGNS A DEED, and if she does not sign it the contract to be null and void, cannot be enforced if the wife dies without signing such deed.

COURT CAN MAKE NO EXPOSITION AGAINST EXPRESS TERMS OF WRITTEN CONTRACT.

ASSUMPT. Plaintiff introduced in evidence the following agreement: "\$100. For value received, I promise to pay Nicholas D. Pendergast, or order, one hundred dollars when Hannah Pendergast, wife of the said Nicholas D. Pendergast, shall sign a certain deed given by said Pendergast to me, dated September 5, A. D. 1843, and if the said Hannah does not sign said deed, said note is null and void. Lee, September 5, 1843." Hannah Pendergast never signed the deed. The opinion states the other facts.

Wells and Richardson, for the plaintiff.

Christie, for the defendant.

By Court, PERLEY, J. According to the first bargain which the parties made, the plaintiff's wife was to release her right of dower by joining in the deed with her husband. The plaintiff was unable to perform his part of the bargain, because his wife refused to execute the deed. Thereupon the first bargain was abandoned and a new one made, according to which the land was conveyed. The original verbal agreement for the sale of the land may therefore be laid out of the case.

The new agreement, on which the land was sold, was reduced into writing at the request of the parties; it was deliberately examined and considered by them; was signed and delivered by the defendant and received by the plaintiff at the same time with the execution of the deed. The whole price of the land was paid according to the bargain, except such sum as might be due by the terms of the defendant's written contract. It is very plain, on extremely familiar principles, that the plaintiff, if he recover at all, must recover on the written contract. Nothing remains due for the land, unless the plaintiff is entitled to the one hundred dollars according to that contract.

The signing of the deed by the plaintiff's wife is made a condition precedent to his right of recovery on the written contract. The writing provides, in terms, that, unless she sign the deed, the note shall be void. The plaintiff undertook for the act of his wife. If he meant to claim on the contract, it was his business to see that she signed the deed. The wife had no power, in law, to act for or by herself; and the defendant could be under no obligation to apply to her on the subject. As to the defendant, the case stands as if the plaintiff had stipulated for his own act: Com. Dig., tit. Condition, L, 4; *Mill Dam Foundry v. Hovey*, 21 Pick. 417.

It might be conjectured and surmised, from the general nature of the transaction, that this sum of one hundred dollars was retained out of the price of the land on account of the wife's claim of dower; and that when her claim was extinguished, whether by her release or by her death, it would be reasonable that the defendant should pay the money. But this is not the contract which the parties have seen fit to make. There is no suggestion of fraud or mistake. The written instrument, under which the plaintiff claims, is express and emphatic, that the money is not to be paid unless the plaintiff's wife sign the deed. Here is no ambiguity of language, and no exposition can be made against the express words of the written contract. It is not for us to inquire into the motives and reasons which induced the parties to make this agreement. They have made it in very plain terms, and the court cannot make another for them: *Cutter v. Powell*, 6 T. R. 320; *Gerrard v. Clifton*, 7 Id. 679; *Jennings v. Camp*, 13 Johns. 96 [7 Am. Dec. 367]; *Jarvis v. Rogers*, 3 Vt. 339.

It is not, however, difficult to suppose reasons which might induce the defendant to decline giving his contract to pay this sum at the death of the plaintiff's wife, if she did not

sign the deed in her life-time. It might embarrass a sale of the land by the defendant, or discourage him from making improvements on it, if his title were to remain clouded with an incumbrance of dower, till the death of the plaintiff's wife; and he might well insist that his contract should be so written as to furnish the plaintiff with a motive to procure a prompt discharge of the incumbrance. But it is enough that by the clear and unequivocal terms of the contract, the plaintiff is not entitled to recover on it.

Tucker v. Maxwell, cited for the plaintiff, from 11 Mass. 143, is very distinguishable from this case. There, the defendant for an antecedent debt gave his draft to the plaintiff, payable on the return of the brig Cataract. The brig never returned; and after a reasonable time, the plaintiff brought his action on the draft, and also for the antecedent debt. The court held, by reference to mercantile usage, that the plaintiff was not to take the risk of the brig's return; that her return was mentioned as a general term of credit; that the plaintiff, on the facts of that case, had his remedy for the original demand; but they distinctly held that the plaintiff could not maintain his action on the draft, except in the time of the draft itself; that is, on the return of the vessel from the voyage then in contemplation.

In this case, there is no antecedent debt upon which the plaintiff can fall back, as he never had any claim, except by the writing.

Judgment on the verdict.

BURLLEIGH v. COFFIN.

[22 NEW HAMPSHIRE, 113.]

RIGHTS OF HUSBAND OVER WIFE'S PROPERTY.—The husband is the absolute owner of all the wife's personal property, and of such choses in action as he reduces to possession, and of all the rents and profits of her estates; he has a life estate in her lands, and is liable for her debts.

HUSBAND CANNOT CHARGE WIFE'S ESTATE with the labor, services, and expenses incurred in making improvements upon it, nor for money expended in defending her title to it.

RECITAL OF PAYMENT OF CONSIDERATION CANNOT BE CONTRADICTION for the purpose of defeating the conveyance in which the recital appears.

MARRIAGE ABROGATES ALL DEBTS BETWEEN PARTIES TO IT.

APPEAL from a decree of the Belknap probate judge. The opinion sufficiently states the facts.

Nesmith and Pike, and Vaughan, for the plaintiff.

Bell, for the defendant.

By Court, EASTMAN, J. By examining the declaration in this case, it will be seen that the claim of the plaintiff is against the estate of his wife to an amount exceeding a thousand dollars. Four hundred dollars of this sum is alleged to be the consideration of a deed of certain lands from the plaintiff to his wife, Sarah Burleigh, given to her before marriage; which sum was never paid, but was due at the time of their intermarriage. And the rest of the claim is for labor and services performed and improvements made upon the real estate of the wife during coverture, extending over a period of twenty years; and also for moneys paid on account of certain controversies growing out of said real estate.

The pleadings set forth no antenuptial engagements, as preliminary to the marriage, and we must therefore decide the case upon principles governing marital rights and liabilities. These principles are generally very well settled.

By marriage, the husband and wife become one person in law. There is but one will between them, and that is placed in the husband. The very legal existence of the woman is incorporated into that of the husband. The husband becomes, at once, the absolute owner of all the personal property of the wife, which she held in possession at the time of the marriage. Her choses in action he can reduce to possession, and they also become absolutely his. Should she die before he reduces them into possession, he can be appointed administrator upon her estate, and obtain their contents; and, according to some high authorities, he is entitled to all her choses in action, whether reduced into possession or not, and after his death they go to his personal representatives: *Whitaker v. Whitaker*, 6 Johns. 112; *Stewart v. Stewart*, 7 Johns. Ch. 229. He also gains an interest in and control over her chattels real; and if she has only an interest of a life estate in lands, the husband is entitled to the profits during the marriage. If, at the time of the marriage, she is seised in fee of lands, the husband, upon the marriage, becomes seised of the freehold, *jure uxoris*, and he takes the rents and profits during their joint lives. It is a freehold estate in the husband, since it must continue during their joint lives, at least, and may last during his life, should he become tenant by the curtesy. So, of whatever occurs to the wife during coverture; the law gives the husband the same right over the real estate and chattels real as if they belonged to her before marriage, and the same absolute power over any personal estate or interest accruing to the wife by

gift, devise, or otherwise. And as he becomes the possessor of all her means, so the law requires that he shall pay all her debts contracted before marriage. Such are some of the general principles applicable to the rights and liabilities of husband and wife: 1 Bla. Com. 442; 1 Bac. Abr. 286, tit. Baron and Feme; *Portington's Case*, 10 Co. 42; 2 Inst. 510; Co. Lit. §51; 2 Kent's Com., lecture 28; *Udell v. Kenney*, 3 Cow. 590; *Griswold v. Penniman*, 2 Conn. 564; *Shuttlesworth v. Noyes*, 8 Mass. 229; *Dade v. Alexander*, 1 Wash. (Va.) 30; *Upshaw v. Upshaw*, 2 Hen. & M. 381 [3 Am. Dec. 632].

The largest portion of this claim is for improvements made upon the real estate of the wife during coverture, and moneys paid in consequence of controversies growing out of that real estate. As the husband receives all the rents and profits of the real estate of the wife, improvements made upon it generally will compensate for the labor performed. The husband is not obliged to make improvements unless he chooses so to do; nor is he compelled to contest the title, and incur expenses thereby. If he believes the title to be good, he will contest it, that he may retain the property and have its use. If, on the contrary, he thinks the title bad, he can abandon it without cost.

This plaintiff, by his marriage, obtained all the personal property and choses in action belonging to the wife, if she had any. He also enjoyed the whole income of her real estate for twenty years during the coverture; and if they had children, he has also a life estate as tenant by the curtesy. If he saw fit to make improvements upon the real estate of his wife, he did it at the risk of receiving back a compensation for his labor by an increased income; and, in the event of her death, he cannot charge the estate with the labor, and services and expenses, incurred in improving the real estate. Such a doctrine would strike at the very foundation of marital principles, and in too many instances the whole property would be absorbed by the charges for expenditures. If this branch of the claim can be sustained, then the husband can, without any antenuptial agreement or trust, keep an account against his wife during coverture for all moneys paid and labor expended about her property; and if he may keep an account, which shall be legal, then he must, as a necessary consequence, have the power of instituting a suit against her for its enforcement. In other words, the husband and wife become, in law, separate and distinct persons.

The charges for money paid by the plaintiff in settling the

controversy relative to the real estate and upon the bond given, stand upon the same principles. He need not carry on a contest unless he so elects. The giving of the bond by himself and wife is a voluntary act on his part, undertaken for the benefit of his wife's property, the rents and profits of which he was constantly receiving. This matter comes within the principle of *Campbell v. Wallace*, 12 N. H. 362 [37 Am. Dec. 219]. In that case it was held, that if a husband assents to a partition of land, by which his wife receives more than her share of the real estate, and he in consequence pays the amount required, he acquires by the payment no title himself to the land thus set off, except what his marital rights confer upon him, having the benefit of the use himself during the coverture. So in this case, the money paid upon the bond or reference gave him no claim upon the property, or against the estate, other than what he acquired by the coverture in receiving the income of the property.

These views dispose of all the items claimed, except the four hundred dollars, the consideration of the deed. And in regard to that, we think the demurrer to be equally as well taken as it was to the other branch of the claim.

This conveyance was made before marriage, by the plaintiff to his wife, without consideration, as the plaintiff says. He regards the land to be worth four hundred dollars, and in his fifth count, alleges a special promise to pay the same. As between these parties, could this claim be enforced had they never been married? The creditors of the grantor might attach the property, and avoid the conveyance. But even they could not collect the consideration of the grantee, if the agreement between the parties was, that the deed should be without consideration. Neither could the grantor enforce the payment of a consideration which had never formed a part of the contract, or entered into the terms of the conveyance. The most that he could do would be to avoid the conveyance as a *nudum pactum*. Whether he could do even that, is by no means certain; for, as a general principle, the receipt of the payment of the consideration expressed in a deed cannot be contradicted for the purpose of defeating the conveyance: *Morse v. Shattuck*, 4 N. H. 229 [17 Am. Dec. 419]; *Pritchard v. Brown*, Id. 397 [17 Am. Dec. 431].

But supposing this conveyance had been for a consideration, to be paid by the wife before marriage, and was, at the time the marriage ceremony took place, a debt due from the wife to the husband: did not the debt become abrogated by the mar-

riage? The husband is liable for the debts of the wife contracted before marriage. He assumes, at the time of the marriage, all her liabilities; or rather, the law requires him to assume them. The debts due from him to her become canceled, as he becomes the owner of her personal property and choses in action; and *vice versa*, the debts due from her to him also become canceled, as he becomes liable for her debts. Whether, therefore, we view this conveyance as made without consideration, or regard the claim as a debt due from the wife to the husband at the time of the marriage, it is equally unsustainable upon any recognized principles.

The position of the plaintiff, that "the marriage does not annul the contract, but only places it in abeyance," cannot be carried out without unsettling all the well-established principles of marital rights and liabilities, and suspending, for the time being, the operation of the statute of limitations. There is no analogy between a contract of this kind and the doctrine of abeyance, as that term is used and applied in the books of law. An estate is said to be in abeyance when there is no person *in esse* in whom it can rest and abide; it being granted, in the first instance, to some person during life, with the inheritance in certain heirs. And the existence of such an estate has been ably controverted, the doctrine being that the inheritance remains in the grantor until the grantees shall be *in esse*.

The rights of certain persons are excepted from the operation of the statute of limitations, but there is no exception that could operate in a case like the present. And unless some principle can be ascertained different from those that have been suggested, this claim would most of it have been barred by the statute of limitations.

We have not omitted to examine the position of the plaintiff, that the promises alleged in the first three counts were made at a time when they legally might be. Assuming that to be the fact, the difficulty consists in this, that the plaintiff seeks to enforce them after they have become abrogated by the marriage. They therefore cannot avail him. Nor is there any peculiar power in the probate court or in the superior court, on appeals, that we can discover, by which this case can be taken out of the operation of general principles applicable to marital rights. The court of probate is a court of law, with discretionary powers, and the superior court, sitting as a court of appeals from the probate court, is governed by the same principles. The decisions of both courts, when acting upon cases of a probate character, are to be governed by the princi-

ples of the common and statute law. The superior court has chancery powers, but these proceedings are not in chancery; and even if they were, we apprehend there is no principle in chancery practice by which this claim could be allowed.

Judgment for the defendant upon the demurrer.

AT COMMON LAW, WIFE'S PERSONAL PROPERTY VESTS IN HUSBAND, but her choses in action do not become absolutely his until reduced to possession: *Slocumb v. Breedlove*, 28 Am. Dec. 135; and if not reduced to possession by the husband during her life-time they do not vest in him at all, but go to her personal representatives: *Leakey v. Maupin*, 47 Id. 120; *Capliger v. Sullivan*, 37 Id. 575, and note, where this subject is discussed at length.

IMPROVEMENTS PLACED BY STRANGER UPON ANOTHER'S LAND become the latter's property: *Crest v. Jack*, 27 Am. Dec. 353, and note.

VENDOR IS ESTOPPED TO DENY FACTS RECITED IN HIS TITLE DEEDS: *Talbot's Ex'rs v. Bell's Heirs*, 43 Am. Dec. 126; *Lodge v. Simonton*, 23 Id. 48, and note; *Reeder v. Barr*, 22 Id. 762, and cases collected in note.

MESSER v. WOODMAN.

[22 NEW HAMPSHIRE, 172.]

INDEBITATUS ASSUMPSIT FOR GOODS SOLD BUT NOT DELIVERED will not lie. BY PURCHASE OF SEVERAL SEPARATE LOTS AT AUCTION a distinct contract is created as to each parcel, and not one entire contract as to the whole. WHAT IS SUFFICIENT DELIVERY OF GOODS.—Where defendant bid off at auction a portion of a quantity of hay, it was held that to constitute a delivery of it, separation of the portion so bid off from the residue, and an offer and an acceptance by the buyer, were necessary.

DELIVERY IS INCOMPLETE WHILE ANYTHING REMAINS TO BE DONE.

TO CONSTITUTE DELIVERY, IT MUST BE SUCH as waives the vendor's lien.

IN DELIVERY OF GOODS ALREADY IN BUYER'S POSSESSION, the same acts of segregation, offer, and acceptance are necessary as in other cases.

ASSUMPSIT. One Thayer had some hay in a barn on his farm, and sold the hay to one Cashman, who sold it to plaintiff. Thayer then sold his farm to defendant, reserving the hay already sold, but which was in the barn. Plaintiff had the hay sold at auction, and defendant bought in several separate parcels of one ton each, of which the auctioneer kept a memorandum. John Pettis was the other purchaser. The hay was never separated, and was burned in the barn. Plaintiff sued for the hay. On the above state of facts defendant moved for a nonsuit, which the court refused. The ground was that there had been no delivery. Verdict for plaintiff, and defendant appealed.

Pike, for the plaintiff.

Kittredge, for the defendant.

By Court, Woods, J. The two counts embraced in the declaration are substantially the same. They are both for goods sold and delivered, in different recognized forms of declaring. The action is not brought to recover damages for the non-performance of the contract of sale. If it were so, perhaps, the effect of the statute of frauds upon the contract might become a material matter of inquiry. It would become in that case, perhaps, material to determine whether a sale in separate lots, and constituting separate contracts of sale of each lot, is shown by the case, or whether the sale of the several parcels of hay is to be regarded as one sale of all the parcels. If the former view would be proper to be taken, perhaps the operation of the statute would be avoided, while if the latter is the true view of the transaction, the validity of the sale might be directly affected by the provisions of the statute, if no delivery were shown, since the value of the several parcels, in the aggregate, is found by the verdict to be greater than thirty-three dollars. And so, although the value was uncertain at the time of the sale: Chit. Con. 389; *Watts v. Friend*, 10 Barn. & Cress. 448.

In the case of the sale of goods by auction, if several lots be put up separately, and separately struck off to the same purchaser, and on each occasion the auctioneer write down the name of the vendee, there is, in point of law, a distinct and independent contract as to each lot, although the purchaser afterwards sign one memorandum that he has bought the several lots: *Roots v. Lord Dormer*, 4 Barn. & Adol. 77. A similar doctrine would seem to prevail where an estate is sold by auction in several lots, and the same person becomes the purchaser of the several lots. In such case, the better opinion, and that supported by the greater weight of authority, would seem to be, that a distinct contract is created as to each parcel, and not one entire contract as to the whole: *Emmerson v. Heelis*, 2 Taunt. 38; *Johnson v. Johnson*, 3 Bos. & Pul. 169; *James v. Shore*, 1 Stark. 430; Chit. Con. 298, and cases there cited. In the case of *James v. Shore*, the plaintiff, having consolidated the two contracts, and declared them as one, was nonsuited at the trial.

It might also become material, in the case supposed, to consider the sufficiency of the memorandum of sale. But the decision of the points referred to is not material in the determination of the case at bar, and we therefore forbear their further consideration.

It cannot be doubted, that, if a delivery of the hay be shown, the action may well be maintained; but if there be no suffi-

cient delivery, or what is equivalent to a delivery, there can be no recovery of the price of the hay: Chit. Con. 394; *Simmons v. Swift*, 5 Barn. & Cress. 857; Noyes's Maxims, 88. In the event of a delivery shown, it could make no difference whether the sale of the several parcels constituted one entire contract or several distinct contracts, or whether the value of the goods sold was greater or less than thirty-three dollars.

The great and the only material question, then, to be determined here is, whether the hay was, in point of law, delivered to the defendant; or whether it was so in his possession at the time of the sale that its condition, together with the acts of the plaintiff and defendant, were equivalent to a delivery of the hay to and an acceptance of the same by the defendant.

It is laid down in Saunders's Pleading and Evidence, 536, that to support an action for goods sold and delivered, it must be proved, not only that the property in the goods vested in the defendant, but also that they were actually or virtually delivered, and that the plaintiff must show that he has divested himself of all lien upon the goods, and that the defendant might maintain trover for them, without paying or offering to pay for them.

In *Goodall v. Skelton*, 2 H. Black. 316, the facts were, that the plaintiff had agreed to sell a quantity of wool to the defendant; that a shilling, earnest-money, was paid on the part of the defendant to bind the bargain; that the wool was packed into cloths, furnished by the defendant for that purpose, and left at a house belonging to the plaintiff, and that the defendant was to send his wagon in a few days and take it away. But while the defendant's servant was weighing and packing it, and proposing to the plaintiff to fix the time when the wagon should come, the plaintiff declared that "it should not go off his premises till he had the money for it." The plaintiff brought an action for goods sold and delivered. Buller, J., said: "In general, in questions of this sort, the usage of the trade is resorted to, in order to show whether there has been a delivery or not. But here the evidence is, that the plaintiff peremptorily insisted on not parting with the goods till he was paid; clearly, therefore, there was no delivery." Rooke, J., said: "I am of the same opinion. The plaintiff had a right over the goods at the time; if so, they were not delivered, for if they had been delivered, that right would have been in the defendant."

In *Simmons v. Swift*, 5 Barn. & Cress. 857, the case was thus: The owner of a stock of bark entered into an agreement

to sell it at a certain price per ton, and the purchaser agreed to take and pay for it on a day specified, and a part was afterwards weighed and delivered to the defendant. In an action for goods sold and delivered, it was held that the property in the residue did not vest in the purchaser until it had been weighed, that being necessary in order to ascertain the amount to be paid, and that even if it had vested, the seller could not, before that act had been done, maintain an action for goods sold and delivered. Bayley, J., said: "I therefore think that the bark which remained unweighed at the time of the loss was at the risk of the seller; and even if the property had vested in the defendant, I should have thought that it had not been delivered, and consequently that the price could not have been recovered on a count for goods sold and delivered."

In *Hanson v. Meyer*, 6 East, 614, it was decided that under a contract of sale, whereby the vendee agreed to purchase all the starch of the vendor, then lying at the warehouse of a third person, at a fixed price per hundred-weight, the weight of which was not then known, but was afterwards to be ascertained, and the vendor gave a note to the warehouse keeper, directing him to weigh and deliver his starch to the vendee, the absolute property in the goods did not vest in the vendee before the weighing, which was to precede the delivery, and to ascertain the price; and that part of the starch having been weighed and delivered to the vendee, by his direction, the vendor might, notwithstanding such part delivery, upon the bankruptcy of the vendee, retain the remainder, which was still unweighed, in the warehouse in the name and at the expense of the vendor. Lord Ellenborough, C. J., remarked, in delivering the opinion of the court: "By the terms of the bargain, formed by the broker of the bankrupts, on their behalf, two things in the nature of conditions, or preliminary acts, on their part, necessarily preceded the absolute vesting in them of the property contracted for. The first of these does so, according to the generally received rule of law in contracts of sale, namely, the payment of the agreed price, or consideration for the sale. The second, which is the act of weighing, does so, in consequence of the particular terms of this contract, by which the price is made to depend upon the weight. The weight, therefore, must be ascertained in order that the price may be known and paid, and unless the weighing precede the delivery, it can never for these purposes effectually take place at all."

In *Rohde v. Thwaites*, 6 Barn. & Cress. 388, it was decided by Bayley, J., that, "where a man sells part of a large parcel of goods, and it is at his option to select part for the vendee, he cannot maintain any action for goods bargained and sold until he has made that selection; but as soon as he appropriates part for the benefit of the vendee, the property of the article sold passes to the vendee, although the vendor is not bound to part with the possession until he is paid the price." Holroyd, J., said, the selection being made by the plaintiff, and notified to the defendant, and he having promised to take the selected goods, "that is equivalent to an actual acceptance by the defendant," and "consequently, the plaintiff was entitled to recover, under the count for goods bargained and sold."

In *Hart v. Tyler*, 15 Pick. 171, in an action of *assumpsit* for goods sold and delivered, where it appeared that the plaintiff left the goods with a third person, and desired him to deliver them to the defendant when they should be called for, and they were not called for by the defendant, but remained in the possession of such third person, it was held that this was not a delivery of the goods to the defendant, and therefore, that the count was not supported by the evidence.

In *Davis v. Hall*, 3 N. H. 382 [14 Am. Dec. 373], it is decided that, in order to vest a present right of property in goods sold, nothing must remain to be done on the part of the seller before the commodity is to be delivered.

And under a contract of sale, whereby the vendee purchased and paid for a quantity of hay, to be weighed out of a mow whenever he should see fit to move it, it was held that, under this contract, the property did not so vest in the vendee before the weighing as to enable him to maintain an action of trover for the hay purchased.

And this is but the general principle recognized in the books, when goods are sold and any material thing remains to be done, as between the seller and the buyer, before the commodity purchased is to be delivered, either to distinguish the goods or to ascertain the price thereof: Chit. Con., 5th Am. ed., 375, and cases there cited.

In Massachusetts, the general doctrine upon this subject is admitted to be as laid down in Chitty.

In *Macomber v. Parker*, 13 Pick. 183, the court lay down the doctrine thus: "The general principle is, that where any operation of weight, measurement, counting, or the like, remains to be performed, in order to ascertain the price, the quantity,

or the particular commodity to be delivered, and to put it in a deliverable state, the contract is incomplete until such operation is performed. But where the goods or commodities are actually delivered, that shows the intent of the parties to complete the sale by the delivery; and the weighing, measuring, or counting afterwards would not be considered as any part of the contract of sale, but could be taken to refer to the adjustment of the final settlement as to the price. The sale would be as complete as any sale upon credit before the actual payment of the price."

On a sale of personal property, where anything remains to be done before the sale can be considered complete, whether to be done by the vendor or the vendee, as between the parties themselves, the property does not pass, although the property itself is placed in the possession of the vendee: *Ward v. Shaw*, 7 Wend. 404.

In *Parker v. Mitchell*, 5 N. H. 165, the question was, whether *indebitatus assumpsit* could be maintained for the price of an anvil sold by auction. One of the conditions of the sale was, that the purchaser should have a credit of ninety days, giving good security, and the anvil was struck off to a bidder, who removed it a little way in the auction-room, but afterwards refused to take it or to give security. It was decided that the action could not be maintained until the expiration of ninety days. The court said: "The circumstance that the buyer took the anvil and moved it is not conclusive evidence to show a delivery by the seller, or acceptance by the buyer. At furthest, it only shows what might, perhaps, be considered an acceptance if the seller elected so considered it. For it is clear the buyer had no right to take the anvil until the security was given."

In Chit. Con., 5th Am. ed., 375, this doctrine is laid down: "If a man buy of a draper twenty yards of cloth, the bargain is void if he do not pay the money, at the price agreed upon, immediately," when the day of payment is not limited. "But when nothing is specified as to delivery or payment, although everything may be done to divest the property out of the vendor, so as to throw the risk on the vendee, still there results to the vendor, out of the original contract, a right to retain the goods until payment of the price:" *Id.*

In order to satisfy the statute of frauds, there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession of the whole in the vendee, and there must be an actual acceptance by the latter, with an intention

of taking the possession as owner: Chit. Con. 390; *Phillips v. Bistolli*, 2 Barn. & Cress. 513.

Upon a full consideration of the authorities, it seems to us that there was no sufficient delivery shown in the present case to enable the plaintiff to maintain his action for goods sold and delivered.

The hay in the bay, that was struck off to the defendant, was sold by the ton, and was a part only of a larger quantity, and was never separated from the residue. According to the case of *Davis v. Hall*, 3 N. H. 382 [14 Am. Dec. 373], it is clear that the property in that portion did not pass to the defendant. The mere offer, by the plaintiff, to weigh off the hay, did not amount to a separation or delivery of any portion of it to the defendant.

In order to complete the sale and delivery of the portion sold, it was necessary that the same should be separated from the residue, and offered to the defendant, and accepted by him. And so long as, according to the agreement, anything remained to be done to ascertain the quantity, there could be no sufficient delivery to pass the property, unless such condition precedent was waived, of which there is no pretense in this case.

There is a further reason, according to the authorities, why the hay cannot be regarded as delivered to the defendant. There must be an acceptance on the part of the buyer, as well as an assent on the part of the seller, to constitute a valid delivery. Here was neither. In the present case the seller offered to weigh and deliver the hay, provided the defendant would either pay the price or secure its payment. The defendant refused to do either, and also refused to accept a delivery of the hay from the plaintiff. Here, then, was no offer by the plaintiff to deliver the hay discharged of his lien or right to the possession of it, until payment or security should be made. In so doing, the plaintiff, it is true, asserted only a clear right, which the law secured to him, to retain the possession of the property until the price should be paid. This is a right which always remains in the seller when no credit is stipulated to be given. But at the same time, in order to an effectual delivery, such as will pass the property, and entitle the seller to treat the property as sold and delivered, and to recover the price thereof in an action for goods sold and delivered, the delivery must be such as will amount to a waiver or discharge, of any such right of lien, in the vendor. The refusal of the defendant to accept the hay, at the hands of the plaintiff, and the claim

of lien on the part of the plaintiff, are as decisive of the question of the delivery of the hay sold, that was upon the scaffold, which was sold in a separate lot, as of that in the bay.

The fact that the hay was in the barn of the defendant cannot alter the case. It was there before the sale, and the mere fact that it remained there without any exercise of acts of ownership over it afterwards, in connection with the distinct refusal of the defendant to accept the delivery, can add nothing to the claim of the plaintiff to a recovery in the action.

For these reasons, we are of the opinion that the motion of the defendant for a nonsuit should have been granted, and that the ruling of the court below, denying the motion, was erroneous. The verdict must therefore be set aside, and a new trial granted.

WHAT IS SUFFICIENT DELIVERY TO PASS TITLE: See *Jewett v. Lincoln*, 31 Am. Dec. 36, and note 39, where prior cases in this series are collected.

SEPARATION AND DELIVERY OF ARTICLES ESSENTIAL TO CONSUMMATION, and effect of vendor retaining possession: See *Hagle v. Michelberger*, 31 Am. Dec. 449, and note. But see *Hooban v. Bidwell*, 47 Id. 386. And as between the parties to the sale only, see *Castar v. Davies*, 46 Id. 311.

DELIVERY IS SUFFICIENT THOUGH SOMETHING REMAINS to be done by the vendee, if the vendor has done all that is incumbent on him: *Hunt v. Therman*, 40 Am. Dec. 683.

THE PRINCIPAL CASE IS CITED to the point that where anything remains to be done upon the sale of chattels, a present right of property does not attach in the vendee, in *Gilman & Sanborn v. Hill*, 36 N. H. 320.

HUTCHINS v. BRACKETT.

[22 NEW HAMPSHIRE, 252.]

MAIL CONTRACTORS ARE NOT LIABLE IN ASSUMPSIT FOR MONEY inclosed in a letter, handed to and lost by the mail-carrier employed by them, and through his neglect.

ASSUMPSIT for one hundred dollars for neglect to carry and deliver a certain letter. Plea, general issue. Defendants had a contract with the government for carrying the mail on the route on which the letter was sent and lost. Plaintiff directed a letter containing one hundred dollars, and finding the post-office closed, handed it to Smith, the mail-carrier, who had received the mail-bag, and was on the coach-box ready to start. The next post-office was at Lisbon, six miles distant. It was agreed that neither the money nor letter was delivered by Smith at the post-office at Lisbon or elsewhere, and that he had not accounted for it.

S. H. Goodall, for the plaintiff.

Hibbard, for the defendants.

By Court, PERLEY, J. The counsel for the defendant have contended that Smith, the carrier of the mail, was prohibited by the post-office laws of the United States from receiving the letter in question at the post-office in Bath, under the circumstances stated in this case, to be carried to the next post-office; and that consequently, the receiving and carrying of the letter being in violation of the law, no action can be maintained on the contract relied on by the plaintiff. We do not find it necessary to determine this point, and shall take it for granted that Smith had a right to take the letter at Bath, under the circumstances stated in the case, and carry it to the post-office at Lisbon, and that in receiving the letter to be so carried, he was acting according to his duty, under the post-office laws.

There is no evidence stated of any express contract to carry, or of any particular instructions by the plaintiff. But Smith was the carrier of the mail; he was starting when he received the letter, on the route with the mail; it was his duty to receive a way-letter and deposit it in the next post-office, and it was a violation of his duty, for which he was punishable by fine, to carry the letter beyond the next office. It may, therefore, well be presumed, in the absence of proof to the contrary, that the plaintiff delivered and Smith received the letter to be carried and put in the next post-office, and that it was the duty of Smith so to carry and deliver the letter.

The general question then arises, whether contractors for the transportation of the public mails are liable in *assumpsit* for the neglect of mail-carriers, employed by them on their routes, to carry and deliver way-letters, according to their duty and the regulations of the post-office.

The leading case on this subject is *Lane v. Cotton*, decided in 1701, and reported 1 Ld. Raym. 646; S. C., 12 Mod. 472, and 1 Salk. 17. That action was case against the defendants as postmaster-general of England, for negligence in the execution of their office, by which a letter containing divers exchequer bills of the plaintiff, being delivered into the office at London, to be sent by post to Worcester, was opened in the office, and the exchequer bills inclosed taken away.

It appeared, in a special verdict, that a letter of the plaintiffs, containing eight exchequer bills, was deposited in the post-office in London, which was in charge of the defendant's

deputy, and the letter opened in the office, by some person unknown, and the bills taken away. It was held by three judges, against an elaborate dissenting opinion of Lord Holt, that the defendants were not liable for the defaults of the other officers and agents of the post-office; on the ground that the post-office was an institution of the government, established and regulated by law; that all the officers and agents of the post-office were officers and agents of the government, and not the agents and servants of the postmaster; that no contract was made by the postmaster, or any officer or agent of the post-office, with those who use the public accommodation of the office; that each officer and agent was liable in a proper form of action to any individual who had suffered by his neglect of duty; but that no officer or agent was liable for the default of another. It is related by Lord Campbell, in his *Lives of the Chief Justices*, vol. 2, p. 141, as a remarkable instance of the overwhelming weight of Lord Holt's opinion, even when in the wrong, that in this case of *Lane v. Cotton*, *supra*, the defendants, notwithstanding the judgment of the court in their favor, were so alarmed by the threat of a writ of error, that they paid the whole demand.

The same point was incidentally discussed in *Rowning v. Goodchild*, 2 W. Black. 906, but does not appear to have been drawn directly in question again, until the case of *Whitfield v. Lord Le Despencer*, 2 Cowp. 754, decided in 1778, in which the doctrine of *Lane v. Cotton*, *supra*, was confirmed, and the point appears never to have been questioned since in England.

The doctrine of these English cases has been recognized in this country, and applied to the post-office establishment of the United States: *Dunlop v. Munroe*, 7 Cranch, 242; *Schroyer v. Lynch*, 8 Watts, 453; *Conwell v. Voorhees*, 13 Ohio, 523 [42 Am. Dec. 206].

In *Conwell v. Voorhees*, it was decided that a mail contractor is not liable to the owner of a letter containing money transmitted by mail, and lost by the carelessness of the contractor's agent in carrying the mail.

That action was case, and the declaration alleged that the plaintiff put in the post-office at Liberty a letter containing four hundred dollars, directed to Cincinnati; that the letter came to the possession of the defendants, as mail-carriers, and was lost by their negligence.

The letter was lost from the mail carried by a coachman employed by the defendant. The court say: "A mail-carrier has

no contract with those who transmit articles by the public mail; he receives no fee or reward from them. His contract is with the government of the United States, for the performance of acts in the execution of a public function; he is remunerated by the government. So far, then, as the transmission of the mail is concerned, a mail-carrier is a public agent, and as such, only responsible. Hence, the defendants, being public agents, are not responsible for the negligence or misfeasance of the drivers."

We are not able to distinguish *Conwell v. Voorhees* from this case. Smith could not lawfully carry the letter, except as a way-letter in the mail, and as the agent of the post-office. It can make no difference whether he carried the letter in the mail-bag, or, as a way-letter, in his pocket. In both cases the mail-carrier acts as a public agent, in the discharge of a public duty, and not as the mere servant of the contractor who employs him. He takes an oath for the faithful discharge of his duty, and is subject by law to various penalties for violation of it: Act of congress, March 3, 1825, U. S. Stat. 103, 104, 106, 107.

We are therefore of opinion that the defendants cannot be charged in this action, because they are not liable for the defaults of Smith, their subordinate public agent in the post-office. Smith would himself be liable, if the plaintiff had suffered from his negligence in the discharge of his duty, as carrier of the mail; but not in this form of action, as no contract is implied on the part of the post-office department, or any of its officers or agents, with individuals who send letters or money through the office. There must be judgment for the defendants.

MAIL CONTRACTORS ARE NOT RESPONSIBLE for a letter containing money lost by the carelessness of their agent who carried the mail: *Conwell v. Voorhees*, 42 Am. Dec. 206, and note, where the subject of liability for loss of mail is discussed at length.

CASES
IN THE
SUPREME COURT AND COURT OF
ERRORS AND APPEALS
OF
NEW JERSEY.

FINLEY v. SIMPSON.

[2 ZABRISKIE, 311.]

ACTION OF COVENANT CAN ONLY BE SUSTAINED where the instrument upon which the action is brought has been actually signed and sealed by the party, or by his authority; this is a general principle which is abundantly sustained by the authorities, but is subject to certain exceptions.

IN.—INDENTURE OF BARGAIN AND SALE, purporting to be *inter partes*, by which an estate is conveyed to the grantee, is the grantee's deed as well as the deed of the grantor, if the grantee accept it and the estate therein conveyed, although the indenture be not signed and sealed by him; and the grantor can maintain an action of covenant on the instrument against the grantee for breaches of covenants contained in it.

COVENANT. Plea, *non est factum*. The declaration alleged substantially that the plaintiff, being owner of a piece of land, conveyed the same by deed of bargain and sale to the defendant; that the conveyance was subject to a mortgage, which the defendant, by a covenant contained in the deed, agreed to pay; that the defendant failed to pay the mortgage, and the plaintiff was compelled to pay it. This action was brought for the breach of that covenant. The plaintiff proved his seisin of the land; that the defendant accepted the deed and became seised and possessed of the said land under it. He also offered in evidence the record of the deed; it contained the covenant alleged, and was signed and sealed by the plaintiff, but not by the defendant. The defendant moved for a nonsuit; the motion was overruled and a verdict directed for the plaintiff, sub-

ject to the opinion of the supreme court on the admissibility of the deed in evidence.

Hubbell, for the defendant.

Bradley, *contra*.

By Court, GREEN, C. J. The general principle that an action of covenant can only be sustained where the instrument upon which the action is brought has been actually signed and sealed by the party, or by his authority, is abundantly sustained by the authorities cited by the counsel of the defendant. There are, however, exceptions, of which actions upon the custom of London, actions against the king's lessee by patent, and against remaindermen, are admitted instances.

The only inquiry is, whether an indenture of bargain and sale, purporting to be *inter partes*, by which an estate is conveyed to the grantee, if the grantee accept the deed, and the estate therein conveyed, though the indenture be not sealed and delivered by him, is not his deed, as well as the deed of the grantor. The affirmative of the proposition is sustained by the following authorities, cited with many others, in the brief of the plaintiff's counsel: Co. Lit. 231 a, 230, C, note 1; Shep. Touch. 177; 4 Cru. Dig. 893, Deed, tit. 32, c. 25, sec. 4; 3 Com. Dig., Covenant, A, 1, Fait, A, 2, C, 2; Vin. Abr., C, Condition, I, a, 2; *Burnett v. Lynch*, 5 Barn. & Cress. 589; Dyer, 18, C, pl. 66.

A modern elementary writer of high reputation denies the doctrine deduced from these cases, and insists that the action of covenant, unless it be founded on the custom of London, or on a contract between the king and a subject, can only be supported against a person who, by himself or some other person acting on his behalf, has executed a deed under seal: Platt on Cov. 18. He admits, however, that the contrary doctrine has been received without scruple by the profession, has been adopted by writers distinguished for their legal attainments, and that, perhaps, it has been too long established to be now reversed. There is in our judgment no reason why the doctrine should be reversed.

In the present case the verdict ought not to be disturbed, if it can be sustained consistently with legal principle. It is manifestly in accordance with the truth and justice of the case. The objection goes to the form of the remedy, rather than to the substantial right of the party or to the title of the plaintiff to redress. The nature of the covenant, moreover, is

fully stated upon the face of the declaration. Whether the facts there stated did or did not constitute a covenant on the part of the defendant, was a question of law, which might well have been raised by demurrer. To give the defendant the benefit of the exception now may operate utterly to defeat the claim of the plaintiff. It is consistent neither with law nor justice that the defendant should hold the title without paying the price. These considerations cannot affect the legal principle, but if the verdict be in accordance with a doctrine long established, and often recognized, they afford strong reasons why that doctrine should not lightly be disturbed.

The rule to show cause must be discharged.

DEED NOT SIGNED BY GRANTER, EFFECT OF.—The principal case was cited in *Earle v. Mayor etc. of New Brunswick*, 9 Vroom, 52, to the point that a grantee in a deed *inter partes*, whereby an estate is conveyed, is bound by the conditions, covenants, and stipulations therein on his part, although it is signed only by the grantor; his acceptance of the deed is such assent to its terms as will render it binding on him. *Finley v. Simpson* was also cited to the point that covenant would lie on such an instrument, in *Sanger v. Upton*, 13 Nat. Bank. Reg. 234; and as showing that this was an exception to the general rule that an action of covenant could only be sustained where the instrument upon which the action was founded was actually signed and sealed by the party or by his authority, in *Harrison v. Vreeland*, 9 Vroom, 367.

COVENANT LIES ON SPECIALTY EXCLUSIVELY, and not on a specialty modified or enlarged by simple contract: *Vicary v. Moore*, 27 Am. Dec. 323; as to when it may be maintained on a written contract, though not fully performed, see *Ligget v. Smith*, Id. 358; see also the citations of the principal case under the preceding head.

PRINCETON BANK v. CROZER.

[2 ZABRISKIE, 368.]

LEVY OF EXECUTION SHOULD HAVE SUFFICIENT CERTAINTY AND PUBLICITY; and for the purpose of a sale and consequent delivery, the officer should have the property actually or constructively under his control.

SHERIFF IN LEVYING UPON CAPITAL STOCK OF BANK should inform the defendant, if within his jurisdiction, that he takes his stock under the writ; and also, by giving notice of his execution at the bank and requiring a certificate of the stock, obtain control over the shares and demonstrate his intention to appropriate them; merely entering upon an inventory of the property levied on "six shares capital stock," without informing the defendant that he had levied upon his stock, or seeking a delivery over of his certificate, is insufficient.

CERTIORARI to reverse a judgment of the court of common pleas. The opinion states the case.

By Court, OGDEN, J. This controversy originated in the court for the trial of small causes. Crozer & Moore prosecuted the Princeton Bank, before Samuel Evans, esq., a justice of the peace in the county of Mercer, to recover from them certain semi-annual dividends that had been declared upon six shares of the capital stock of the bank, from the first of November, 1845, to the first of May, 1847, both inclusive. The justice rendered a judgment in favor of the plaintiffs, for the amount of the dividends. The bank appealed to the court of common pleas, and upon a retrial, that court also rendered judgment against them. The *certiorari* is brought to reverse the judgment of the court of common pleas.

A state of facts agreed upon by the parties compresses the question in dispute within a small compass. It appears by it that Henry Clow, of Princeton, on or before the twelfth day of April, 1845, owned six shares of the stock of the Princeton Bank, on each of which the sum of thirty dollars had been paid. That in the term of March, 1845, of the Mercer county circuit court, one Richard Warren had recovered against Clow a judgment for six hundred and forty-one dollars and fifty-four cents, and that an execution was issued thereon against his goods and chattels, lands and tenements, and was delivered to the sheriff on the fifth day of April, 1845; that on the twelfth of April, a levy was made by the sheriff on the real and personal property of the defendant, Clow, and an inventory thereof made and annexed to the execution, and returned with it, in which inventory is, among other things, the following description: "Six shares capital stock of the Princeton Bank, value, thirty dollars per share." "That a short time after the date of the levy, a sale was duly made, by the sheriff, of the property of the defendant, and that the six shares of stock in question were purchased by the said Richard Warren for twenty-five dollars a share, and a receipt for the amount was given by him to the sheriff, on account of the said execution; and that a notice, in writing, was subsequently given by the said Warren to the bank, not to pay the dividends to Crozer & Moore."

It was also agreed that no notice of the levy or of the sale was given to the cashier of the bank until some time after a transfer of the shares had been made by Clow to Crozer & Moore.

It does not appear in the case whether the sale by the sheriff took place before or after the said transfer. The foregoing

facts exhibit the ground upon which the bank relied in refusing to pay over the dividends to Crozer & Moore.

The case also shows "that Crozer & Moore's claim to the stock and to the dividends in question arose in this wise: One of the firm, before the tenth of May, 1845, called at the bank, having in his possession a certificate for six shares of their stock in favor of Henry Clow, and inquired of the cashier if the stock was clear, and could be transferred. The cashier examined, and found no lien against it on the part of the bank; and not having then received notice or information, in any way, that there was any bar to its being legally transferred by Clow, responded accordingly; that shortly after this, and on the tenth of May, 1845, Henry Clow appeared in person at the bank, and transferred, upon the transfer book thereof, to Crozer & Moore six shares of the capital stock of the bank; and on the same day the cashier issued a certificate for the same to the said Crozer & Moore."

"It was agreed between the parties that if, upon the foregoing state of the case, this court shall be of opinion that the levy was insufficient, and the plaintiffs below were entitled to recover, then the judgment of the court of common pleas shall be affirmed; but if the court shall be of opinion that the levy was sufficient, and the plaintiffs were not entitled to recover, then the judgment shall be reversed."

It will be readily perceived that the case turns upon the point whether Warren, in virtue of his execution against Clow, and of the proceedings thereon by the sheriff, acquired such a lien upon and right to the stock as should in law prevail against the transfer made by Clow to Crozer & Moore.

In New Jersey, that species of property was first subjected to levy upon an execution at common law, by an act of the legislature, passed on the ninth of March, 1842, entitled "An act to abolish imprisonment for debt." It is enacted in the fifth section that any share or interest of a defendant in any bank, insurance company, or other joint-stock company, that is or may be incorporated under the authority of this state, may be taken and sold under the writ of *fi. fa.*, in the same manner as in the case of goods and chattels. In the sixth section it is provided that if the person having the charge of the books of any such company be shown the writ by an officer, he shall be bound to give to the officer a true certificate of the number of shares or amount of interest held by a defendant in such company.

How did the sheriff take the stock in this instance? He did

not go to the banking-house to make a levy, and there, under the authority of the act, obtain a certificate, or notify any officer of the institution that he claimed to have a lien on those shares. He did not inform the defendant in execution that he had levied upon his stock, or seek a delivery over of the certificate, but he simply entered "six shares of the stock" upon his inventory, and made a return thereof with the execution.

Could that act constitute a sufficient levy upon the stock? My opinion is, that it could not. Stock is an intangible right or property, the shares being distinguishable from each other, only, by their respective owners. A certificate is usually issued by the company, showing the number of shares held by a person, and the amount paid thereon, which paper is recognized in mercantile transactions as evidence of the property it represents, and is surrendered when a transfer or sale is made.

Although the strictness of some of the rules of common law respecting levies upon goods and chattels has been relaxed in this state by courts considering defendants in execution as agents or storekeepers of the sheriff, yet neither the reason for such lenity, nor its practicability, can be applied to property of this nature. The interests of justice demand that levies should have sufficient certainty and publicity, and that, for the purposes of a sale and consequent delivery, the officer should have the property actually or constructively under his control.

In cases like that now under examination, public policy and commercial convenience plainly require that the officer should inform a defendant, if within his jurisdiction, that he takes his stock under the writ; also, that he should go to the office of the company, and, by giving notice of his execution there to some officer, and requiring a certificate, as secured to him by the fifth section of the act, he should obtain a control over the shares, and should demonstrate his intention from that time forward to appropriate them, in obedience to the command of his writ.

Without such ostensible and certain appropriation of the property, an inventory and return would not sufficiently indicate a levy upon this species of effects. They might lead to great losses and to frauds, and materially embarrass the sales and transfers of stock. Such would not be a taking of the property, within either the letter or the spirit of the act.

The revised statutes of 1846 make bank notes belonging to a defendant in execution liable to be taken upon a *fi. fa.* Would an officer make a sufficient levy upon a one-hundred-

dollar bank bill, so as to hold it against a transferee of the debtor, by an inventory and return, the money remaining in the debtor's possession, subject to his control? Such a doctrine could not be gravely insisted on.

In the case before us, the sheriff having omitted to do those acts which were requisite to make his levy sufficient, I am of opinion that Crozer & Moore were entitled to recover the dividends declared upon the six shares of stock, after their purchase of them from Clow.

Let the judgment of the common pleas be affirmed, with costs.

NECESSITY OF TAKING POSSESSION ON LEVY BY SHERIFF: See *Hill v. Harris*, 50 Am. Dec. 542, and note. In *Caldwell v. Fifield*, 4 Zab. 160, Green, C. J., said: "It is well settled in this state that it is not necessary that the goods should be taken into the actual custody of the sheriff, or that they should be removed out of the possession of the defendant. It is enough if there be an inventory made by the sheriff having the property in his view or under his control. . . . The decision of this court in *The Princeton Bank v. Crozer & Moore*, 2 Zab. 383 [principal case], is limited to a particular species of property; it does not at all conflict with the views now expressed."

LEVY, WHEN VOID FOR UNCERTAINTY: See *Taylor's Lessee v. Cozart*, 40 Am. Dec. 655, and note.

STOCK, LIABILITY OF, TO EXECUTION: See *Coombs v. Jordan*, 22 Am. Dec. 236. The principal case was cited in *Blair v. Compton*, 33 Mich. 424, to the point that the common law that corporate shares were not subject to levy and sale upon execution had been changed in many states, and that wherever such a change had been made, the authorities all agreed that if the statute authorizing such a levy and sale had not been substantially complied with, then the sale was unauthorized and void, and cannot be ratified, as in case of a sale being voidable merely on account of some irregularity

NORTH RIVER MEADOW CO. v. SHREWSBURY CHURCH.

[2 ZABRISKIE, 424.]

JUDGMENT OF SUPREME COURT AS TO VALIDITY OF ASSESSMENT IS CONCLUSIVE in a subsequent action on the same assessment, where the cause was virtually between the same parties, although its title was different.

SIGNING IS NOT NECESSARY TO VALIDITY OF ASSESSMENT made by the directors of a corporation.

VARIANCE BETWEEN ALLEGATION AND PROOF IN ACTION ON ASSESSMENT does not exist where the proof shows that an assessment alleged to have been made by three directors was signed by but two directors.

BOOKS AND MINUTES OF CORPORATION ARE COMPETENT EVIDENCE of the proceedings of the corporation.

ALTERATION APPARENT UPON FACE OF ASSESSMENT is presumed to be made before the assessment was signed; and it is incumbent upon the party charging the instrument to be void by reason of an alteration subsequently made to sustain the averment by clear proof.

ACT CHANGING RATE OF INTEREST OPERATES ONLY ON CONTRACTS MADE and debts incurred after the law went into operation.

INTEREST ON ASSESSMENT CANNOT BE RECOVERED UNDER COUNT FOR MONEY LOANED, as to support a count for money loaned there should have been a loan of money.

FORM OF VERDICT GIVEN FOR DEBT AND INTEREST should not be for the whole amount as a debt, but the verdict should be given for the debt, and the residue of the amount, being the interest recovered, should be in the shape of damages for the detention of the debt.

DEBT to recover assessments levied under plaintiffs' charter upon defendant's lands. The plaintiffs, against the defendant's objection, introduced the book of minutes and the book of assessments of the managers in evidence, and the record of a decision in the supreme court and the court of errors, confirming the assessment as valid; the *certiorari* upon which the judgment was rendered having been prosecuted by the defendant in this cause. The defendant moved for a nonsuit on the ground of a variance between the allegations in the declarations and the proof, as the plaintiffs declared the assessment to have been made by the three directors, whereas it was signed by but two directors. The motion was overruled. The court also refused to admit evidence on the part of the defendant that the land was not benefited by the improvements, on the ground that the judgment on the *certiorari* concluded this point, and charged the jury that this decision was conclusive upon the validity of the assessment, and that the assessment would carry interest at seven per cent, as it was made in 1823. Verdict for plaintiff. The case was brought here on a rule to show cause why a new trial should not be granted; the grounds for the new trial are stated in the opinion.

Wall and Vroom, for the rule.

Vredenburg and Dayton, contra.

By Court, GREEN, C. J. Several of the reasons assigned for a new trial in this cause relate to the validity of the law organizing the Meadow company, and the regularity of the proceedings under it. Another reason relied upon is, that the record of the proceedings and judgment upon a writ of *certiorari*, prosecuted by the defendants in this cause in the name of the state, directed to the plaintiffs, were improperly admitted in evidence.

The *certiorari* referred to in the reasons assigned was prosecuted for the purpose of testing directly the validity of the proceedings under the act incorporating the Meadow company. The constitutionality and validity of the law itself, the regu-

larity of the proceedings under it, and their binding operation upon the defendants in this cause, are all put directly in issue by the proceeding. The return made by the Meadow company to the *certiorari* sets out those proceedings at length. The reasons assigned by the Shrewsbury church for vacating and making void the assessments concerning the church lands, embrace all the points of objection suggested upon the trial of this cause, and now urged as reasons for a new trial. The proceedings were in all things affirmed by this court, and that judgment was, upon writ of error, affirmed in the court of appeals. That decision necessarily involved the adjudication of all the reasons assigned for reversal. It must have proceeded upon the ground that there was no error in the proceedings. These points must be considered as authoritatively settled, and no longer open for litigation.

The record in that cause was virtually between the same parties in relation to the same subject-matter now sought, in a collateral way, to be inquired into. It is true that in the title of the cause the church appears both as prosecutor and as defendant. This, however, is a mere formal matter. It might have been entitled between the parties in this cause without affecting the regularity or the substance of the proceeding: *State v. Hanford*, 6 Halst. 71.

If it were otherwise, upon principle, the record would be competent to show that the validity of the statute and the regularity of the proceedings under it, had been expressly adjudicated by the court in the last resort. The decision of that court upon all the questions of law involved in the case was justly held to be conclusive upon the court and jury at the trial. It is equally binding upon this court. This disposes of the most material and embarrassing questions involved in the controversy, and leaves but two or three points of minor importance to be disposed of here.

One of the reasons relied upon for a new trial is, that the assessment set forth in the declaration is alleged to be made by three commissioners, whereas the assessment offered in evidence is signed by two commissioners only. This, it is insisted, is a fatal variance between the allegation and the proof.

The declaration avers the assessment to have been made by Reuben Shreve, William Truex, and John Taylor. The assessment offered in evidence was in writing, with the following caption prefixed: "Assessment made this twenty-first day of November, 1820, by Reuben Shreve, William Truex, and John

A. Taylor, managers of the North River Meadow Company, as follows, to wit." It is signed by two of the managers only, and hence it is insisted that it was made by two only. But this conclusion is not warranted. The assessment upon its face purports to have been made by all the commissioners. It is signed, it is true, but by two. But signing is no essential part of the making of the assessment. It would have been valid though but one name had been signed, or even if it were entirely without signature. The law does not require that it should be signed at all. If the law had directed that the assessment should be signed by the managers, or a majority of them, it would then have been deemed the act only of those who signed it. But the statute contains no such direction, and the assessment must be deemed to have been made, as it purports to be, by all three managers. The case is clearly distinguishable from the case of a promissory note, an award, or the return of a road, to which it was likened upon the argument. The signing of a note is technically and essentially the making of it; an award is usually required to be under the hands of the arbitrators; the return of a road is required to be signed by the persons making it. In either case, the signing is an essential ingredient of the act done, and the award or the return can be deemed the act of those only who sign it. The declaration does not aver that the assessment was signed by three managers, but that it was made by three, and so is the proof. In this respect there is no variance between the allegation and the proof.

2. Another ground of exception is, that the books containing the assessments of the managers, and the book of minutes of the company, were incompetent and inadmissible as evidence. The assessment is expressly declared by the act to be admissible in evidence. That it was written in a book cannot impair its validity, and the book, it is to be presumed, was offered merely for the purpose of showing the assessment. The books and minutes of a corporation, though not usually evidence against third persons, are competent evidence of the proceedings of the corporation. In *Highland Turnpike Company v. McKean*, 10 Johns. 162 [6 Am. Dec. 324], the court say: "The general rule is (and it is a rule of evidence essential to public convenience), that corporation books are evidence of the proceedings of the corporation:" *Owings v. Speed*, 5 Wheat. 420; *Wood v. Jefferson County Bank*, 9 Cow. 194.

3. It was not incumbent upon the plaintiffs to prove that the alteration apparent upon the face of the assessment was made

before the assessment was signed. The presumption is not against, but in favor of, the validity of the writing. It is incumbent upon the party charging the instrument to be void, by reason of an alteration subsequently made, to sustain the averment by clear proof.

4. The only remaining exception is, that the judge erred in charging the jury to allow seven per cent interest after the fourth of July, 1824. The charge, in regard to the rate of interest, was correct. The assessment, when made, imposed a debt upon the defendants, to be sued for and recovered as such. The act of 1823, changing the rate of interest, operated only upon contracts made and debts incurred after the law went into operation. It did not affect the rate of interest upon debts subsisting previous to the fourth of July, 1824. The statute, though in terms purporting to regulate the rate of interest upon contracts only, regulates the interest upon all debts due, whether by statute, judgment, or agreement of parties: *Verree v. Hughes*, 6 Halst. 91.

The rule to show cause must be discharged. The form of the verdict, as returned upon the *postea*, is erroneous. The first two counts of the plaintiffs' declaration are for the two assessments specifically, amounting together to one hundred and ninety-one dollars and forty-seven and three fourths cents. The third count is for three hundred and eight dollars and fifty-three cents, money borrowed, being the balance of five hundred dollars, the entire debt demanded. There was no evidence to support the last count. Interest, as such, cannot be recovered under it. To support a count for money lent, there must have been a loan of money: 1 Ch. Pl., 7th ed., 384. The verdict appears to have been rendered for four hundred and sixty-two dollars and twenty-eight and one fourth cents debt. It should have been for one hundred and ninety-one dollars and forty-seven and three fourth cents of debt, and the residue of the amount, being the interest recovered, should be in the shape of damages for the detention of the debt: *Mounson v. Redshaw*, 1 Saund. 201 a, note r; *Osbourne v. Hosier*, 6 Mod. 167; *Watkins v. Morgan*, 6 Car. & P. 661; *Sayre v. Austin*, 3 Wend. 496.

The *postea* should be amended accordingly.

Rule refused.

NEVIUS and CARPENTER, JJ., concurred.

JUDGMENT IS CONCLUSIVE ONLY AS AGAINST PARTIES AND PRIVIES: *Voss v. Morton*, 50 Am. Dec. 750, and note; *Alexander v. Walter*, Id. 688, and note; and see *Doe ex dem. Smith v. Tipper*, 43 Id. 483, and note.

FORMER JUDGMENT IS CONCLUSIVE ONLY AS TO MATTERS DIRECTLY IN ISSUE in former suit, and not as to collateral matters: *King v. Chase*, 41 Am. Dec. 675, and note 682.

PRESUMPTION AS TO TIME OF ALTERATION OF INSTRUMENT: See *Wilson v. Henderson*, 48 Am. Dec. 716; *Beaman v. Russell*, 49 Id. 775; *Woodworth v. Bank of America*, 10 Id. 239, and note 273. The principal case was cited in *Putnam v. Clark*, 6 Stew. 343, to the point that no presumption arises to invalidate an instrument because, from an inspection, an alteration appears to have been made.

CORPORATION BOOKS AS EVIDENCE: See *Commonwealth v. Woolper*, 8 Am. Dec. 628, and note.

BOLLES v. BEACH.

[2 ZABRISKIE, 680.]

DUTY OF APPELLATE COURT UPON WRIT OF ERROR is simply to review the ruling of the judge as subjected to their revision by the bills of exception taken in the progress of the trial. It will be assumed that the facts stated are true, and no inquiry will be attempted as to the weight of the evidence or as to the propriety of the verdict.

SHERIFF'S DEED IS ADMISSIBLE, WITHOUT JUDGMENT AND EXECUTION upon which it is founded, to show the amount of money raised by the sheriff.

GRANTOR IN DEED IS NOT ESTOPPED, BY COVENANT AGAINST INCUMBRANCES, from showing, in an action against the grantee, that the deed was given by him and accepted by the grantee, subject to the lien and incumbrance of a mortgage, and upon an express verbal stipulation between the parties, that the grantee, in consideration of the delivery of the deed, would assume the payment of the mortgage and indemnify the grantor against it.

IF GRANTEE FAILS TO PAY MORTGAGE HE HAS AGREED TO PAY as a part of the consideration for the deed, and the grantor discharges the mortgage by giving a new security, he is damnified to the whole extent of the failure by the grantee to discharge the mortgage.

JUDGMENT WILL NOT BE REVERSED FOR VARIANCE UNLESS ERROR IS VERY APPARENT.

ASSUMPT. The main facts are stated in the opinion. The deed of Sheriff Burnet, mentioned in the opinion, was offered to show that the mortgaged premises had been sold for a sum much less than the face of the mortgage; in consequence of which the plaintiff was compelled to settle for the balance by giving a new bond for the same. Verdict and judgment for the plaintiff. The defendant brought error.

R. Van Arsdale and A. Whitehead, for the plaintiff in error.

A. C. M. Pennington, contra.

By Court, CARPENTER, J. Beach brought suit against Bolles for the recovery of damages consequent upon the breach of a

special agreement. The case set up by the plaintiff below is shortly this: In 1835, Beach conveyed to Bolles certain lots of land, in the city of Newark, for the consideration of fourteen thousand two hundred and seventy-four dollars. The deed acknowledged the receipt of the purchase-money, and contained the usual form of acquittance; it also contained full covenants of title and against incumbrances. At the time, however, of the execution and delivery of this deed, a part of the premises conveyed was subject to a mortgage of one thousand dollars, given by Beach and wife to the executors of one John Douglass, deceased. It is alleged that the deed was given by Beach, and accepted by Bolles, subject to the lien and incumbrance of the mortgage, and upon an express verbal stipulation between the parties that Bolles, the defendant, in consideration of the delivery of that deed, would assume the payment of the Douglass bond and mortgage, and would indemnify the plaintiff against them. Bolles did not discharge the bond and mortgage, and Beach having been compelled to pay eight hundred and eighteen dollars and seventy-eight cents of the sum so alleged to have been assumed by the defendant, sued for that amount and the interest.

Much has been said as to the sufficiency of the evidence offered by the plaintiff to sustain his case upon this point. It is sufficient to say that if the verdict was not supported by the evidence, the remedy was in another mode. We are upon a writ of error, and our duty is simply to review the ruling of the judge, as subjected to our revision by the bills of exception taken in the progress of the trial. It will be assumed that the facts stated are true, and no inquiry will be attempted as to the weight of the evidence or as to the propriety of the verdict. Indeed, how can we judge as to the weight of the evidence, when we do not know that all the evidence before the jury has been embodied in the bills of exception?

The first error assigned is the admission of the deed of Sheriff Burnet, without the judgment or decree and execution upon which that deed was founded, so as to show the authority of the sheriff to make the deed. But the deed was not offered to prove title or to show any fact which was dependent on the authority of the sheriff for its effect or validity. It was simply offered to show the amount of money raised by the sheriff, a mere collateral fact, for which purpose the deed was sufficient.

The next question is one of more difficulty. It is insisted, on the part of the defendant below, that the plaintiff was

estopped by his deed, and the covenants which it contains, from proving that a part of the premises charged was incumbered by mortgage, or that the defendant undertook and promised to pay off and discharge that mortgage, as part of the consideration expressed in the deed.

In England, the doctrine of estoppel, that a man shall not be permitted to deny facts which he has admitted by the solemnity of a deed, has been applied to the consideration clause in a deed of conveyance when the question of payment has arisen between the parties to the conveyance. When that clause contained an acknowledgment in the usual formal terms, the grantor has been held to be estopped from showing that no money in fact passed: *Rowntree v. Jacob*, 2 Taunt. 141; *Baker v. Dewey*, 1 Barn. & Cress. 704. It does not appear that it was there ever held otherwise. *Rex v. Scammonden*, 3 T. R. 474, a case so often cited in support of a contrary course of decision elsewhere, did not involve the doctrine of estoppel, not being between parties or privies to the deed. It was a mere settlement case, in which the question depended upon the fact of the purchase of any estate in the parish, and the payment of thirty pounds therefor; and parol evidence was offered, not to contradict the deed, but to ascertain this independent collateral fact. But a different rule has been generally adopted in this country, and the course of decision, for the most part, has been in favor of free inquiry in regard to the fact of payment in actions for purchase-money, etc. Many of the cases on the subject are collected in Cowen's notes to Phillips' Evidence, 217, 218, 1441, etc. (ed. 1843). It is there said that when the intention in regard to the estate is not disputed, nor the operation of the conveyance, as such, sought to be changed, this clause is regarded as formal merely, like the date, and open for explanation by parol. Thus, when the deed acknowledges the payment of the consideration, it cannot be denied by the grantor for the purpose of destroying the effect and operation of the deed, though it may be denied for the purpose of recovering the consideration money: *Grout v. Townsend*, 2 Hill (N. Y.), 557. This doctrine is now in this country supported by such a weight of authority as not readily to be disturbed.

But this case goes somewhat further, and has its peculiar difficulties. The counsel of the defendant below have not contested the doctrine that the payment of the purchase-money is open to inquiry, notwithstanding the consideration clause; but they deny that the plaintiff can prove the existence of an

incumbrance on the premises, as part of his case, when he expressly covenants by his deed that the premises were free of incumbrances.

In England, the injustice which sometimes results from the strict doctrine of estoppel, applied to a clause merely formal, has been so strongly felt, that courts have obviously been ready to use any distinction or ambiguity to escape it, and reach the justice of the case. *Lampon v. Corke*, 5 Barn. & Ald. 606, is an instance. In *Baker v. Dewey*, 1 Barn. & Cress. 704, already cited, the court held that the grantor was estopped from denying that the purchase-money had been paid; but intimated that a part, which had been retained by the grantee to be worked out in his business as a plumber and glazier, might have been recovered in another mode. Baker conveyed land to Dewey in consideration of a given price, but it was stipulated that the latter should retain sixty pounds out of the purchase-money, to be paid in work. While it was held that Baker was precluded from saying that any part of the money remained due as purchase-money, yet it was said that the consideration might have been paid, and a part returned, on condition that the grantee would do certain work for the grantor. The court placed the transaction upon the ground of an independent or *quasi* subsequent agreement. The plaintiff failed because there was no count in the declaration to meet such a case. In *Schilling v. McCann*, 6 Me. 364, the supreme court of Maine adopted the same view, and applied it to another state of facts. S. owned two lots in the same town, one being lot No. 60, otherwise known as the Hall farm, and lot No. 66. Being indebted to W., he mortgaged to him lot No. 66, without any other description, supposing it to be the Hall farm. Afterwards S. sold the Hall farm to M., taking, as part of the consideration, his obligation "to cancel the mortgage given by S. to W., of the Hall farm," which obligation he assigned to W., the mortgagee. In a suit brought on this undertaking by W., in the name of S., he declared, first for money had and received; and in two other counts on the promise to cancel a mortgage, first as on the Hall farm, called by mistake lot No. 66; and secondly, as on lot No. 66, called by mistake the Hall farm. The plaintiff proved that about four hundred dollars, being part of the consideration for the conveyance, was left in the hands of the defendant to pay the mortgage on the Hall farm, who signed an agreement to that effect. Thus the whole transaction in relation to the conveyance of the title, and the payment of part

and the security of the residue of the consideration, was closed at the same time. The construction given to the transaction was, that the agreement to cancel or pay off the mortgage was received as part payment of the consideration, so much being left in the hands of the grantee for that purpose. That as the grantee might have proved in his defense that the agreement had been so received, had he been sued for the unpaid part of the consideration, so on the other hand the grantor might prove, as he did the foregoing facts, for the purpose of showing his claim to the four hundred dollars, as a sum left in the defendant's hands for a purpose which had failed. This sum was left to pay off a mortgage which did not in fact exist, and, the purpose having failed, was so much in the hands of the grantee, who was the defendant, and recoverable under the count for money had and received to the use of the plaintiff.

These cases have been referred to for the principle, by which, in order to reach the justice of the case, the effect of the consideration clause, as held in those courts, was avoided. The collateral and independent character attributed to the agreement, by which a part of the consideration was left in the hands of the grantee to be specially applied, may be here similarly adopted, in order to escape the supposed effect of the covenant against incumbrances. In the time of Lord Mansfield, it was ruled that if a man covenant under seal that another shall enjoy certain premises, he shall not maintain ejectment against that person during the term specified in the covenant, the covenant by estoppel operating as a lease: *Right v. Proctor*, 4 Burr. 2208. It would probably be so held at the present day. However, therefore, the covenant in the present case might estop the grantor in an action between the parties to the deed, brought on the deed or defended by title or justification under the deed, yet can it have that effect in an action not founded on the deed, but upon an agreement merely collateral? In *Carpenter v. Buller*, 8 Mee. & W. 209, it was held that though as between the parties to an instrument under seal, in an action upon it, it is not competent for the party bound to deny a matter of recital, yet it was held that such party is not estopped in an action by the other party not founded on the deed, but wholly collateral to it. Among the cases referred to, to exemplify the doctrine of estoppel, was that of *Lainson v. Tremere*, 1 Ad. & El. 792. In that case, the action was upon a bond to secure the payment of rent under a lease, in which it was recited that the lease was at a rent of one hundred and seventy pounds; and

the defendant was estopped from pleading that it was one hundred and forty pounds only, and that such amount had been paid. The court said, in citing the case, that if in another suit, though between the same parties, the question should arise collaterally as to the amount of the rent, it could not be held that the recital in the bond was conclusive evidence as to the fact. We incline to think, therefore, that in this action the plaintiff is not estopped by his covenants against incumbrances, the question presented being collateral to the deed merely.

But, independent of this technical answer to the objection, if the consideration clause, under the course of adjudication in this country, is made an exception to the general doctrine of estoppel, why should not the exception be extended to the question of payment in this instance, coming as it does within the same reason? The evidence, as to the agreement to pay off the mortgage, did not go to affect the operation of the deed, but simply to show the character and extent of the payment of the consideration; and the same reasons which persuade to the free admission of extrinsic inquiry in the one case, equally apply to the other. We are not willing to reverse on account of the admission of the evidence in this instance.

Another ground of error, predicated upon the exceptions taken at the trial, is, that Beach was not legally damnified, not having discharged the original liability by a payment in money, but merely by giving a new security. It is said that the giving the new security to the holder of the Douglass mortgage did not support the allegation of payment.

Assuming, in this form, that the contract charged was proved, the defendant was obviously damnified to the whole extent of the failure by the defendant to appropriate to the discharge of the Douglass mortgage, the consideration money left in his hands for that purpose. As the giving the new security, received as payment, extinguished the Douglass bond and mortgage, perhaps it is not clear that this case comes within the range of cases cited, or that the plaintiff might not recover under the first count. But however this may be, we do not perceive any difficulty. The second count expressly sets out the giving the new security as the damnification consequent upon the default of the defendant, and the evidence certainly supported that count.

The only other error assigned, necessary to be noticed, is the alleged variance, as to the mortgage, between the declaration

and the evidence. We do not, however, understand the language of the declaration to be as supposed by the counsel of the defendant below. It is not an exception for which we should be inclined to reverse, unless the error were very apparent.

It has been before said that we do not feel called upon to examine those objections which are based upon the supposed defect of evidence. It may be proper to say that, notwithstanding the intervention of a committee of speculators between Bolles and Beach, yet that the purchase-money was to be paid to the latter for his own benefit; he was therefore the party in interest, and entitled to sue, though it is true, when paid, it became also so much paid on account of that committee.

We think (though I hesitated on one or two points) that the judgment ought to be affirmed.

HALSTED, Chancellor, delivered a dissenting opinion.

For affirmance: Justices Carpenter, Randolph, and Ogden, and Judges Porter, Schenck, and McCarter—6.

For reversal: The Chancellor, Justice Nevius, and Judges Speer and Wall—4.

Judgment affirmed.

APPELLATE COURT, DUTY OF, IS TO REVIEW LEGALITY OF PROCEEDINGS of the court below: *Planters' Bank v. Calvit*, 41 Am. Dec. 616. A bill of exceptions brings up only errors in the opinion, direction, or judgment of the court: *State v. Somerville*, 38 Id. 248; and where the bill of exceptions states that certain facts appeared, the appellate court must take it that these facts were undisputed, or conceded by both parties: *Beach v. Packard*, 33 Id. 185.

PAROL EVIDENCE TO SHOW REAL CONSIDERATION OF DEED, when and when not admissible: See *Bullard v. Briggs*, 19 Am. Dec. 292; *Banks v. Brown*, 30 Id. 380; *Schermerhorn v. Vanderheyden*, 3 Id. 304; *Duval v. Bibb*, 4 Id. 506; *Betts v. Union Bank*, 18 Id. 283.

JUDGMENT REVERSED ONLY FOR ERROR APPARENT IN DECISION: *State v. Scott*, 42 Am. Dec. 148.

PAROL ASSUMPTION BY PURCHASER OF LAND OF MORTGAGE THEREON is valid, and may be enforced: *Mount v. Van Ness*, 6 Stew. 263, citing the principal case. *Bolles v. Beach* was also cited in *Strohauer v. Voltz*, 42 Mich. 448, as supporting a similar position, and the court said that this case was not opposed to other cases, or out of harmony with the general rule which excludes parol evidence to control writings. The principal case was also referred to in *Wilson v. King*, 8 C. E. Green, 152, on the point that a covenant in a deed that premises were free from incumbrances, will not estop the complainant from recovering on a parol agreement by the grantee to pay or assume a mortgage on the premises, as part of the consideration.

STATE v. DAYTON.

[3 ZABRISKIE, 49.]

ON APPLICATION TO QUASH INDICTMENT FOR PERJURY, IT IS DISCRETIONARY whether the court will quash the indictment, or put the party to his plea or demurrer, or leave him to a motion in arrest of judgment.

PERJURY IS LIMITED EXCLUSIVELY TO OATHS ADMINISTERED IN SOME JUDICIAL PROCEEDING at the common law.

MEANING OF WORD "DEPOSITION," AS USED IN TWENTY-THIRD SECTION OF ACT FOR PUNISHING CRIMES, is limited to the written testimony of a witness given in the course of a judicial proceeding, either at law or in equity, and it is not used as synonymous with "affidavit" or "oath."

TAKING OF FALSE AFFIDAVIT IS PERJURY within the provisions of the act relative to oaths and affirmations: R. S. 871.

INDICTMENT NOT FOUND UPON PRODUCTION OF LEGAL AND COMPETENT EVIDENCE before the grand jury is not essentially vicious, so as to give the defendant a right to have it quashed; the constitutional right of a defendant that he shall be presented by a grand jury does not require that the presentment be founded only upon legal and competent evidence.

MATERIALITY OF AFFIDAVIT UPON WHICH PERJURY IS ASSIGNED must appear with convenient certainty. It may be shown by direct averment, or may appear from the matter shown upon the record.

AFFIDAVIT IS MATERIAL SO AS TO SUSTAIN INDICTMENT FOR PERJURY under it when taken under an act providing that a certain bank that had suspended shall not resume operations until the affidavit as to its capital had been filed.

FALSE AFFIDAVIT MAY SUSTAIN INDICTMENT FOR PERJURY, THOUGH UN-AVAILING from other causes, if the oath was material when it was taken.

AFFIDAVIT DIFFERING FROM PHRASEOLOGY OF STATUTE PRESCRIBING IT will, if false, sustain an indictment for perjury where it is identical in meaning with the statute and was filed to comply with the law.

AUTHORITY OF OFFICER TAKING OATH NEED NOT BE AVERRED WITH TIME AND PLACE, in an indictment of the affiant for perjury, if every material act done to constitute the offense is averred with time and place.

CONCLUSION OF INDICTMENT, WHERE THERE IS MORE THAN ONE STATUTE need not be against the form of the statutes.

OBJECTIONS THAT NAME OF JUROR IN CAPTION DID NOT CORRESPOND with the name in the panel, and that the indictment is averred to have been presented upon the oaths and not upon the oath of the grand jurors, cannot be sustained.

MOTION to quash an indictment for perjury for taking a false affidavit. The opinion states the case.

Elmer, attorney-general, for the state.

F. T. Frelinghuysen and A. C. M. Pennington, contra.

By Court, GREEN, C. J. This is an application on the part of the defendant to quash an indictment for perjury. It is in all cases a matter of discretion whether the court will quash an indictment, or put the party to his plea or demurrer, or

leave him to a motion in arrest of judgment: *Rex v. Wheatly*, 2 Burr. 1127; Com. Dig., tit. Indictment, H; 1 Ch. Crim. L. 299; *State v. Hageman*, 1 Green, 314; Wharton's Cr. L. 131.

The application is almost uniformly denied by the English courts in cases of treason, felony, and other high crimes. In *Rex v. Belton*, 1 Salk. 372, Holt, C. J., said we never quash indictments for perjury: Com. Dig., tit. Indictment, H; 1 Ch. Crim. L. 300.

In this country, the courts have lent a more ready ear to applications to quash, as being less dilatory and expensive than other modes of proceeding. But still they are by no means *ex debito justitiæ*, and there are strong considerations of public policy why they should not be granted in the higher grade of crimes, except for substantial reasons, and then only in cases entirely clear of doubt: *State v. Hageman*, 1 Green, 323; *People v. Eckford*, 7 Cow. 535; Wharton's Cr. L. 131; 1 Chit. Crim. L. 300.

Where the facts charged in the indictment clearly constitute no crime; where the court in which the indictment is found have no jurisdiction of the offense; where it appears upon the face of the indictment that the prosecution is barred by lapse of time; or where, for any cause, it is manifest that no judgment can be rendered on the indictment, there is obvious propriety in not putting the defendant to the expense and vexation of a trial. But when the exception is purely technical, in no wise affecting the merits of the controversy, there would seem to be no good reason why the court should exercise its discretionary power in aid of the defendant. Some of the objections relied upon in this case do not call for the interference of the court. But inasmuch as the counsel of the state not only waived all objection to the application, but united with the defendant's counsel in desiring that all the points should be summarily disposed of, all the grounds of objection to the indictment will be now considered and decided. The suggestion is necessary to guard against the action of the court being drawn into precedent.

Perjury, in this case, is assigned upon an affidavit made by the defendant, as cashier of the State Bank at Morris, under the fourth section of an act for the relief of "the president, directors, and company of the State Bank at Morris," approved the fourteenth of February, 1849: Pamph. L. 51. The section enacts that the said bank shall not resume or carry on any banking operations or business until the president and cashier

of the said bank shall make and file in the office of the secretary of this state their affidavit or solemn affirmation that said bank has *bona fide* a cash capital for banking purposes amounting to at least forty thousand dollars. There is no provision in the act that false swearing in taking the affidavit shall constitute perjury. It is insisted that even if the affidavit be false, the person taking it is not guilty of perjury.

The taking of a false affidavit under the act most clearly does not constitute perjury at the common law, which is limited exclusively to oaths administered in some judicial proceeding: 8 Inst. 164; *Ex parte Beeching*, 4 Barn. & Cress. 137; 1 Hawk. P. C., b. 1, c. 69, sec. 1.

Nor does it appear to come within the provision of the twenty-third section of the act for the punishment of crimes: R. S. 262, sec. 23. The term "deposition," it is true, is sometimes used both in common parlance and in legislative enactments as synonymous with "affidavit" or "oath." It is thus defined by Webster. It is obviously so used by the legislature in the act to authorize the president of the council of proprietors in West Jersey, to administer oaths and affirmations to witnesses in certain cases: R. S. 787, sec. 2. But in its more technical and appropriate sense it is limited to the written testimony of a witness given in the course of a judicial proceeding, either at law or in equity: Jac. Law Dict., Deposition; Bouvier's Law Dict., Deposition.

In this restricted sense, it appears, from the context, to have been used by the legislature in the definition of the crime of perjury, in the act for the punishment of crimes. To give to the word "deposition," as used in that act, its more comprehensive sense, would extend the crime of perjury even to official oaths, which could never have been within the contemplation of the legislature. If the legal criminality of the defendant depended upon the provisions of this act alone, the indictment could not be sustained. But the provisions of the act relative to oaths and affirmations (R. S. 871) are much more comprehensive. The act designates the officers before whom may be taken "all oaths, affirmations, and affidavits required to be made or taken by any statute of this state, or necessary or proper to be made, taken, or used in any court of this state, or for any lawful purpose whatever, excepting official oaths, oaths required to be taken in open court or upon notice." The second section then provides that if any person shall willfully and corruptly swear or affirm falsely, in or by

any oath, affirmation, or affidavit, made or taken in pursuance of this act, such person shall be deemed guilty of perjury, and punished accordingly. The primary design of the act was undoubtedly to ascertain the officers before whom oaths, affirmations, and affidavits might lawfully be taken, and to subject persons taking false oaths or affirmations before such officers to the penalties of perjury. It may not have been within the contemplation of the legislature either to define the crime of perjury or to extend or limit its application. Yet such, it cannot be denied, is the necessary effect of the language they have used; and such must be the construction of the act, unless such construction leads to consequences which it is manifest the legislature never could have contemplated. We see no ground upon which the court can avoid the plain and literal construction of the act. Indeed, some countenance is given to the idea that the legislature contemplated such construction by the fact that they have exempted from its operation official oaths, apparently for the sole purpose of exempting them from the penalties of perjury. The oath in question is clearly within the provisions of this statute. It is made necessary by a statute of this state, and is taken before one of the officers designated in the act.

2. It is further objected that the indictment is not found upon evidence produced before the grand jury. In support of the objection, two affidavits, taken in pursuance of notice, have been laid before the court; one made by the officer before whom the affidavit upon which the perjury is assigned purports to have been taken, stating that he was not a witness before the grand jury; the other made by the secretary of state, stating that the original affidavit was filed in his office on the twenty-first of August, 1849, and has not been off the files since that time; that he had not been subpoenaed to produce the original or a sworn copy before the grand jury of the county of Morris, and that, to his knowledge or belief, the original affidavit was not before the grand jury.

These affidavits are incompetent upon this motion, and were so held by this court in the case of *State v. Rickey*, 4 Halst. 296. But in compliance with the request of counsel, we do not place our opinion upon this ground.

Admitting the evidence to be competent, they do not establish the proposition upon which the defendant rests, viz., that there was no legal evidence before the grand jury in support of the indictment. They show that neither the original affidavit

nor the officer before whom it was taken was before the grand jury. But it is easy to conceive of other competent evidence upon which the grand jury may have acted. If a copy of the affidavit had been produced before the grand jury, coupled with proof of the admission of the defendant that he took the affidavit, of which the paper produced was a true copy, would not that have been sufficient to warrant the finding of the grand jury? But conceding that the proposition is fully established, that there was not legal and competent evidence before the grand jury, does that afford the subject-matter to sustain either a motion to quash or a plea in abatement? We are clearly of opinion that in this state, at least, it does not.

If the position be sound, that every indictment not found upon the production of legal and competent evidence before the grand jury is essentially vicious, it follows that in all cases where the witnesses produced before the grand jury are from any cause legally disqualified or incompetent to testify, or where any essential link in the chain of testimony is sustained by evidence not in itself legal, the indictment cannot be sustained, although there be ample competent testimony, not produced before the grand jury, to sustain the charges of the indictment. If it be true, as insisted for the defense, that it is the constitutional right of every defendant, not only that he shall be presented by a grand jury, but that such presentment shall be founded only upon legal and competent evidence, it would seem to follow that in all cases he should have an opportunity of availing himself of the objection, and, as a necessary consequence, that the witnesses should be examined in open court, that the defendant might know not only by whom, but by what evidence, the indictment is sustained. It would neither be consistent with law nor with justice to deprive the party of a legal objection, by permitting the witnesses to be sworn, and the evidence to be taken in private, so that the defendant shall rarely have the opportunity of availing himself of his legal rights. If the law recognized it as a right of the defendant to avail himself of the objection that the indictment was found by the grand jury upon evidence not strictly legal or competent, it would be consistent neither with law nor justice to deprive any defendant of the opportunity of making the objection. The constitution provides that no person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury; but it neither provides the mode of presentment, nor the evidence upon which it shall rest. Nor can it with propriety be said to be a right of the de-

defendant to be informed of the evidence upon which the grand jury acted, or to avail himself of its legal incompetency. The case of *Rex v. Dickinson*, Russ. & Ry. 401, so far as it regards the right of the defendant to avail himself of the objection, must rest, it is presumed, upon the authority of the English statute, and not upon any rule of the common law. It is in reality, however, merely an exercise of discretion on the part of the court, which the court may certainly exercise in the disposition of an indictment in all cases where the grand jury have been guilty of any misconduct, or where, from any cause, public justice will be better promoted by a discharge of the defendant than by an acquittal.

The case of *United States v. Coolidge*, 2 Gall. 864, is apparently an authority in point in support of the motion; but with the highest respect for the tribunal by whom it was decided, we cannot recognize its authority. The case is in more respects than one anomalous, viewed in regard to our law and mode of practice. The cause had been partly tried, and was postponed in consequence of a witness on the part of the state, who had also been before the grand jury, declaring that he was conscientiously scrupulous of taking an oath, as required by law, in consequence of which the prosecution failed, and the witness was committed for a contempt. The counsel of the defendant thereupon moved that the indictment be quashed, on the ground that the witness had not been sworn before the grand jury. The affidavit of the witness was taken to prove the fact that he was not sworn. Counter-affidavits were produced on the part of the prosecution; but the court, taking the fact to be true that the witness was not sworn, quashed the indictment. It is worthy of notice that the motion to quash, so far as appears by the law, was entertained without obtaining leave to withdraw the defendant's plea of not guilty, and that, for all that appeared to the court, there might have been other and competent evidence before the grand jury of the facts testified to by the witness. The case then amounts to this, that if a witness be examined before the grand jury without being sworn, the indictment would be quashed, though the charges be fully sustained by other testimony before the grand jury. It is not denied that the court may, in the exercise of a sound discretion, in order to promote the purity of the administration of justice and for the greater security of the rights of the citizen, quash an indictment by reason of the misconduct of the grand jury. But if it be meant to assert that that is a right on the part of the defendant, of which he may avail

himself by plea, we apprehend the proposition is totally indefensible. It is founded in a misapprehension of the office of the grand jury, who are not to try or convict the defendant, but merely to authorize the accusation upon which he may be put upon trial. To permit every defendant to question the competency and qualification of every witness before the grand jury would lead to the obstruction of the administration, if not the defeat of the ends, of justice; and to make the right at all valuable, the doors of the grand-jury room must be thrown open, and the defendant permitted to scrutinize not only the evidence upon which he is to be tried, but also the evidence upon which he was indicted. The right has never been recognized in New Jersey, and it is obvious that serious evils, without corresponding benefit, must result from its recognition.

3. It is further objected that the affidavit upon which perjury is assigned does not appear by the indictment to be material. The materiality of the oath taken must appear with convenient certainty. It may be shown either by direct averment or may appear from the matter shown upon the record: *Sharp's Case*, Cro. Car. 352; *Lane's Case*, Cro. Eliz. 148; *Rex v. Aylett*, 1 T. R. 69; *Rex v. Dowlin*, 5 Id. 318; *Rex v. Nicholl*, 1 Barn. & Adol. 21; *Commonwealth v. Knight*, 12 Mass. 274 [7 Am. Dec. 72].

In the present case, it appears with convenient certainty, both by direct averment and from the facts set forth in the indictment, that the affidavit was material. It is expressly averred that the affidavit was material to resume banking operations under the act. The affidavit, moreover, is made material by the very terms of the act set forth in the indictment. It was not necessary to aver expressly that the bank had suspended, or that it wished to resume, or that it authorized the affidavit to be made and filed. These matters, so far as they are at all material, appear with sufficient certainty from the face of the indictment. It was certainly material that the affidavit should be made and filed in order to enable the bank to resume its operations, and if the cashier made the affidavit without the order or direction of the directors, it is not the less material, nor is he the less guilty.

4. It is further objected that the oath is not in compliance with the requirements of the statute, and is therefore extrajudicial.

The statute requires that, to enable the bank to resume operations, the president and cashier shall make and file their affidavit that the bank "has *bona fide* a cash capital for banking

purposes amounting to at least forty thousand dollars." The affidavit of the president and cashier is, and of necessity must be, essentially several. Whether it be contained in one paper, or in two, is quite immaterial. The parties are sworn, and testify severally, though there be but one written affidavit. Nor does it at all affect the materiality of the oath of the cashier, or his culpability, if, from any cause, the president failed to take the oath. The oath was material when taken, and if, from any cause, it was rendered unavailing, its materiality was not thereby affected. Two witnesses, or at least one corroborated by circumstances, are essential to sustain an indictment for perjury. If one witness should testify to the fact of perjury, and the testimony should prove unavailing for want of a second witness, the first would not thereby be rendered immaterial, nor the witness relieved from the crime of perjury because all the evidence which the law required had not been produced.

Nor is the objection well founded, that the language of the affidavit is not sanctioned by the law. The legislation did not design to prescribe the precise form of an oath, the slightest deviation from the phraseology of which should prove fatal. The affidavit filed appears to us identical in meaning with that prescribed by the statute. An averment that a bank has *bona fide* a cash capital, or a *bona fide* cash capital, or a cash capital *bona fide*, seems to us to vary rather in sound than in sense. We must presume that the defendant so understood it, and that the affidavit was filed in good faith, to comply with the law, and not with a design to escape the penalty of perjury by a mere verbal transposition.

5. It is objected that the indictment is defective in the averment of the authority of the officer to take the affidavit. The indictment, in this respect, conforms to the precedents found in the books, except that it omits the phrase "then and there." The precedents usually, though not universally, in averring the authority of the officer, aver it with circumstance of time and place. Exceptions to the practice are to be found: Stubbs's Cr. Cir. 520.

The general rule is, that in indictments for offenses of commission, every act which is a necessary ingredient in the offense must be laid with time and place. In cases of felony *in favorem vitæ*, the rule is strictly enforced; but in indictments for misdemeanors, if time and place be added to the first act, it will be construed to refer equally to all the ensuing

acts, although in practice it is usual to repeat the averment: 2 Hale's P. C. 178; *Baude's Case*, Cro. Jac. 41; Arch. Cr. Pl. 11.

In the present case, it is not denied that time and place are added to every material act done to constitute the offense. The indictment charges that the defendant, on the twentieth of August, 1849, at the township of Morris, appeared before C. E. S., then and still being one of the masters in chancery, and then and there, before the said C. E. S., master of chancery as aforesaid, in due form of law was sworn, and did then and there take and subscribe his solemn oath in writing, before the said C. E. S., master as aforesaid (the said C. E. S. having competent power and authority, as such master in chancery, to administer the oath to the said H. D. in that behalf). The addition of time and place extends as well to the authority of the officer as to the fact of taking the oath. The plain and obvious reading of the sentence is, that the master had the authority at the time and place of administering the oath. The indictment, therefore, is sufficiently certain.

6. It is further objected that the indictment should have concluded "against the form of the statutes," and not "against the form of the statute." Whatever may have been the technical refinements in the ancient cases upon this point, the modern authorities do not countenance the objection. The decisions in New Jersey are against it: *Townley* ads. *State*, 3 Harr. (N. J.) 311; *Cruiser v. State*, Id. 206; *State v. Berry*, 4 Halst. 374.

The objections that the name of one of the jurors contained in the caption did not correspond with the name in the panel, and that the indictment is averred to have been presented upon the oaths, and not upon the oath of the grand jurors, have been considered and overruled in the case of *State v. Norton*, 3 Zab. 33, decided at the present term.

The motion to quash must be overruled.

RANDOLPH and OGDEN, JJ., concurred.

The like order will be made in the case of *State v. Lambert Norton*, for perjury, which involves the same points, and was submitted by counsel upon the same argument.

MOTION TO QUASH INDICTMENT IS ADDRESSED TO SOUND DISCRETION OF COURT, and its refusal is no ground of exception: *Commonwealth v. Eastman*, 48 Am. Dec. 596, and note.

WHAT CONSTITUTES PERJURY: See *People v. Collier*, 48 Am. Dec. 699, and note.

INDICTMENT FOR PERJURY, WHAT MUST STATE: See *People v. Collier*, 48 Am. Dec. 699, and note.

STATUTORY OFFENSE, INDICTMENT FOR, MUST CONCLUDE "CONTRA FORMAM STATUTI:" *Chapman v. Commonwealth*, 34 Am. Dec. 565; *Warner v. Commonwealth*, 44 Id. 114; *Hess v. State*, 22 Id. 767; *People v. Enoch*, 27 Id. 197; *Reed v. Northfield*, 23 Id. 662; *Commonwealth v. Searle*, 4 Id. 446; and an indictment which concludes "against the form of the statute" will support a conviction, although the offense charged is the creation of several statutes: *State v. Wilbor*, 36 Id. 245, and note.

CHARACTER OF EVIDENCE BEFORE GRAND JURY NO GROUND FOR QUASHING INDICTMENT: *State v. Boyd*, 27 Am. Dec. 376.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

UNION BANK OF LOUISIANA v. COSTER.

[8 NEW YORK (8 CONSTACK), 208.]

GUARANTIES ARE SUBJECT TO SAME RULES OF CONSTRUCTION, evidence, and sufficiency of consideration as are applied to other contracts, except that (in New York) the statute of frauds requires that they should be in writing, subscribed by the party to be charged, and expressing the consideration.

CONSIDERATION EXPRESSED IN PRINCIPAL CONTRACT WILL SUSTAIN GUARANTY of performance of it, whereof both are in tribute and are given as parts of the same transaction.

GUARANTY WRITTEN UPON LETTER OF CREDIT, and delivered with it, engaging that drafts to be drawn upon the faith of the letter shall be paid, sufficiently expresses the consideration; for the letter may be read with the guaranty, and when so read, shows that the money or other value to be given for the drafts is the consideration.

NOTICE OF ACCEPTANCE OF GUARANTY absolute in its terms, need not be given, in order to charge the guarantor.

SURETY FOR ACCEPTANCE AND PAYMENT OF BILL CAN COMPLAIN OF WANT OF NOTICE of its dishonor, only in case and to the extent that he has suffered loss through such want of notice.

GENERAL LETTER PURPORTING TO AUTHORIZE OPEN AND CONTINUED CREDIT is not limited to dealings with a single individual, but may be presented to several; and each of those who made advances on the faith of it (until any amount to which it is limited is reached) is entitled to sue upon it for reimbursement.

ERROR to review a judgment of the New York superior court on a verdict taken subject to opinion. The action was *assumpsit* on a guaranty. The proof showed that Heckscher & Coster, in New York, gave to Kohn, Daron, & Co., of New Orleans, a letter of credit in these words: "Sir—We hereby agree to accept and pay at maturity any draft or drafts on us, at sixty

days' sight, issued by Messrs. Kohn, Daron, & Co., of your city, to the extent of twenty-five thousand dollars, and negotiated through your bank." Directly underneath it, on the sheet, Coster gave the guaranty on which this action was founded, as follows: "I hereby agree to guarantee the due acceptance and payment of any draft or drafts issued in virtue of the above credit. (Signed) John G. Coster." These writings were not addressed to any particular person; but upon the faith of them the City Bank of New Orleans bought from Kohn, Daron, & Co. one draft such as the letter described, without, however, noting upon the letter the fact that it had thus been used. Later, the Union Bank of Louisiana, on the faith of the letter and guaranty, purchased two more drafts, aggregating nearly ten thousand dollars, both of which were duly accepted and paid. Later yet, the same bank, still holding the letter and guaranty, bought a third draft for four thousand dollars, which was protested, and they then brought this action on the guaranty (against Gerard H. Coster and others, the executors of John G. Coster, he having meantime died). The grounds of defense taken on the trial were: That the guaranty was insufficient under the statute of frauds, because not expressing any consideration or any name or description of a promisee; that the Union Bank ought to have given Coster notice of their intention to act on his guaranty, and afterward, of the dishonor of the draft; that the use of the letter with the City Bank fixed it as a contract with that bank, and it could not afterwards be used with another. As to these points, the judge ruled in favor of the plaintiff. The defendants also alleged a revocation of the guaranty, as to which the judge charged that if Coster revoked his guaranty, and gave the Union Bank notice of the revocation, before the bank purchased the draft in suit, the action could not be maintained, otherwise it could be; and he left the questions of revocation and notice to the jury as matters of fact. The jury found a verdict for plaintiffs for the amount claimed, and the general term ordered judgment on the verdict.

Butler and Evarts, and J. Prescott Hall, for the plaintiffs in error, the executors of Coster.

Charles S. Roe, attorney, and *Benjamin W. Bonney*, of counsel for defendants in error, the Union Bank.

By Court, PRATT, J. Contracts of guaranty differ from other ordinary simple contracts only in the nature of the evidence required to establish their validity. The statute requires every

special promise to answer for the debt, default, or miscarriage of another to be in writing, subscribed by the party to be charged thereby, and expressing therein the consideration; and no parol evidence will be allowed as a substitute for these requirements of the statute. But in other respects, the same rules of construction and evidence apply to contracts of this character which apply to other ordinary contracts. Hence the consideration which will support a contract of this character, as in other cases, may consist in some benefit to the promisor, or some other person at his request, or some trouble or detriment to the promisee: *Smith v. Weed*, 20 Wend. 184 [32 Am. Dec. 525]; *Watson v. Randall*, Id. 201; Theobald on Principal and Surety, 3, 4; *Pullin v. Stokes*, 2 H. Black. 312. Nor is any particular form of words necessary to be used for expressing the consideration; but it is enough if from the whole instrument the consideration expressly or by necessary inference appears; so that it be clear that such and no other was the consideration upon which the promise was made: *Douglass v. Howland*, 24 Wend. 35; *Allen v. Jaquish*, 21 Id. 628; *Walrath v. Thompson*, 4 Hill (N. Y.), 200; *Raikes v. Todd*, 8 Ad. & El. 846; *James v. Williams*, 5 Barn. & Adol. 1109. And the rule allowing two or more instruments given at the same time and relating to the same subject-matter to be construed together as one instrument, applies also to this class of contracts; so that when a guaranty is given at the same time with the principal contract and forms a part of the entire transaction, if the consideration be stated in the principal contract, though none be stated in the guaranty, it will suffice: *Leonard v. Vredenburg*, 8 Johns. 35 [5 Am. Dec. 317]; *Rogers v. Kneeland*, 10 Wend. 218; S. C., 13 Id. 114. So also as in other cases, parol evidence of the circumstances under which the contract was made may be given, to aid the court in giving a true construction to ambiguous terms therein, or to show that separate contracts relate to the same subject-matter.

It should also be observed here, that our statute in terms only requires the contract to express therein what it had been well settled the statute of Elizabeth required it to contain, and the same rules of construction should, therefore, be applied in cases under both statutes: *Douglass v. Howland*, 24 Wend. 35.

With these observations in relation to the law governing cases of this kind, we come to the consideration of the contract in question.

The letter of credit of Heckscher & Coster is an original undertaking on the face of it to accept any drafts to be drawn

upon them at sixty days by Kohn, Daron, & Co. to the extent of twenty-five thousand dollars, and negotiated by the bank to whom it is addressed. The consideration of their undertaking appears very plainly from the instrument. It is an open proposition to the bank to which it is addressed, that if it will purchase the drafts drawn by Kohn, Daron, & Co., they will accept and pay the same. As soon, therefore, as the bank complied with the proposition, the contract was closed, and the rights and liabilities of the parties became fixed. Upon this part of the contract, there can be no question that a sufficient consideration appears upon the face of the contract to uphold it. But it requires no greater or different consideration to support a guaranty than to support an original promise. The only difference in the two cases consists in the former requiring the consideration to appear upon the contract itself, whereas the consideration to support the latter may be proved by parol. The question, therefore, in this case is whether the consideration of the undertaking of the defendants' testator appears upon the instrument itself, or rather whether the two instruments may be read together so that the same consideration shall support both.

The guaranty is without date, and at the foot of the letter of credit. Independent of the parol testimony, it should be deemed to have been made at the same time. It is addressed to the same person, and relates to the same subject-matter. It should, therefore, within every rule of construction, be deemed part of the same transaction, and the two instruments should be read together as one contract. The two would read thus: "In consideration that you, the Union Bank of Louisiana, will purchase any draft or drafts to be issued by Kohn, Daron, & Co., upon Heckscher & Coster, at sixty days, not exceeding twenty-five thousand dollars, we, the said Heckscher & Coster, will accept and pay the same; and I, the said John G. Coster, agree that Heckscher & Coster shall accept and pay the same." Now, it seems to me clear that such is the fair reading of the two contracts taken together; and although the contract of John G. Coster may be deemed collateral, yet had the two been drawn in the above form, no question could have been raised upon the statute of frauds. But what may be fairly inferred from the terms of a contract should be considered, for the purpose of giving it effect, as contained in it; and this rule applies as well to collateral as to original undertakings: *Potter v. Ontario etc. Ins. Co.*, 5 Hill (N. Y.), 147.

There is a wide difference between the guaranty of an exist-

ing debt and the guaranty of a debt to be contracted upon the credit of the guaranty. It is the difference between a past and future consideration. A past consideration, unless done at the request of the promisor, is not sufficient to support any promise. But a promise to do an act in consideration of some act to be done by the promisee implies a request, and a compliance on the part of the latter closes the contract and makes it binding. And although it may be necessary from the nature of the case to prove performance by parol, yet such evidence is no violation of the statute requiring the consideration to be in writing. The consideration of the promise is expressed, and the parol evidence is only used to show, not what the consideration is, but that the act which constitutes that consideration has been performed. Any other rule would require every person to whom a letter of credit is directed to accept the same in writing before the drawer would be bound. For instance, a letter drawn in the country and addressed to a merchant in the city, guaranteeing the responsibility of the person for whose benefit the same was drawn for a given bill of goods to be sold to him, would require a written acceptance by the city merchant before it would be binding upon the drawer. No such strict rule can be found supported by any adjudication. I am therefore satisfied that the consideration of the guaranty in the case at bar sufficiently appears in the contract, and that the same was valid and binding upon the defendant's testator. I have not been able to find a case in our own or the English courts which would conflict with the doctrine above advanced; but on the contrary, the books are full of cases similar in their circumstances to this case, where the guaranty has been sustained: *Leonard v. Vredenburg*, 8 Johns. 35 [5 Am. Dec. 317]; *Bailey v. Freeman*, 11 Id. 221 [6 Am. Dec. 371]; *Rogers v. Kneeland*, 10 Wend. 218; S. C. in error, 13 Id. 114; *Marquand v. Hipper*, 12 Id. 520; *Douglass v. Howland*, 24 Id. 35; *Walrath v. Thompson*, 4 Hill (N. Y.), 200; *Staats v. Howlett*, 4 Denio, 559; *Shortrede v. Cheek*, 1 Ad. & El. 57; *Lysaght v. Walker*, 5 Bli. N. R. 1; *Jarvis v. Wilkins*, 7 Mee. & W. 410; *Stadt v. Lill*, 9 East, 348; S. C., *sub nom. Stapp v. Lill*, 1 Camp. 242; *Russell v. Moseley*, 3 Brod. & B. 211; *Newbery v. Armstrong*, 4 Car. & P. 59; *Ryder v. Curtis*, 8 Dow. & Ry 62.

The next question raised in the case is as to notice of acceptance. We must hold the law to be settled in this state that where the guaranty is absolute no notice of acceptance is necessary. Judge Cowen, in *Douglass v. Howland*, 24 Wend.

35, and Judge Bronson, in *Smith v. Dann*, 6 Hill (N. Y.), 543, examined the cases at length upon this question, and they showed conclusively that by the common law no notice of the acceptance of any contract was necessary to make it binding, unless it be made a condition of the contract itself, and that contracts of guaranty do not differ in that respect from other contracts. In this case, the only condition of Coster's undertaking was that the bank should purchase the drafts to be issued by Kohn, Daron, & Co., and upon complying with that condition the rights of the parties became fixed, and the contract binding. There is nothing in the contract from which we can infer that it was the intention of the parties that notice should be given in order to fix the guarantor. No more is required to make the guarantor liable than to make Heckscher & Coster, and the only notice to them necessary was the presentment of the drafts for their acceptance within a reasonable time: *Allen v. Rightmere*, 20 Johns. 365 [11 Am. Dec. 288]; *Clark v. Burdett*, 2 Hall, 197; *Somersall v. Barneby*, Cro. Jac. 287; *Brookbank v. Taylor*, Id. 685; *Smith v. Goff*, 2 Salk. 457; Vin. Abr., tit. Notice, A, 8; Com. Dig., tit. Pleading, C, 75; *Atkinson v. Carter*, 2 Chit. 403.

As to notice of non-acceptance and non-payment of the bills by the drawees, that can only involve the subject of laches on the part of the holders of the drafts, and all the cases, both in England and in this country, concur in holding that this defense can only be set up to an action against the surety in cases where he has suffered damage thereby, and then only to the extent of such damage: *Douglass v. Reynolds*, 7 Pet. 117; *Reynolds v. Douglass*, 12 Id. 497; *Cremer v. Higginson*, 1 Mason, 323; *Russell v. Perkins*, Id. 368; *Wildes v. Savage*, 1 Story, 22; *Craft v. Isham*, 13 Conn. 28; *Hitchcock v. Humfrey*, 5 Man. & G. 559; *Walton v. Mascall*, 13 Mee. & W. 452; 3 Kent's Com. 122. If, therefore, it were necessary in this case to give any notice, no evidence has been given showing that the defendants, or the guarantor, suffered any loss in consequence of the want of such notice.

The only remaining question, therefore, worthy of consideration in this case arises out of the fact that another bank had previously purchased drafts drawn in pursuance of the letter of credit and guaranty. It is claimed that by such purchase the contract became a fixed and binding contract between such bank and the promisor, and thereby lost its negotiable character, and became located so that no other person or bank could purchase drafts upon the credit of it.

The guaranty in this case was manifestly intended to accompany the letter of credit, and is subject, in this respect, to the same construction. If, therefore, it was competent for Kohn, Daron, & Co. to draw several drafts not exceeding the limit in the bill of credit specified, and to negotiate them at different banks, and Heckscher & Coster would be bound by their letter of credit to accept and pay them, the guarantor would also be liable to the same extent. As a general rule, the surety is liable to the same extent as the principal, unless he expressly limits his liability: Theobald on Principal and Surety, 46. It therefore only becomes necessary to examine the letter of credit, and ascertain whether it was intended to be limited to one particular bank, or is a general letter of credit to any and all persons who may advance money upon it. It is somewhat singular that we find so few adjudications in our courts upon a class of commercial instruments which enter so largely into the commerce and business of this country, and of the world.

In England, it seems to be at this time questionable whether a party who advances money upon a general letter of credit can sustain an action upon it: *Russell v. Wiggin*, 2 Story, 214; *Bank of Ireland v. Archer*, 11 Mee. & W. 383. The reason assigned is that there is no privity of contract between them. It is there assumed that it is only a contract between the drawer of the letter and the person for whose benefit it is drawn. But in this country the contrary doctrine is well settled. Letters of credit are of two kinds, general and special. A special letter of credit is addressed to a particular individual by name, and is confined to him, and gives no other person a right to act upon it. A general letter, on the contrary, is addressed to any and every person, and therefore gives any person to whom it may be shown authority to advance upon its credit. A privity of contract springs up between him and the drawer of the letter, and it becomes in legal effect the same as if addressed to him by name: *Russell v. Wiggin*, 2 Story, 214; *Duval v. Trask*, 12 Mass. 154; *Carnegie v. Morrison*, 2 Met. 381; *Ontario Bank v. Worthington*, 12 Wend. 593; *Adams v. Jones*, 12 Pet. 207; *Birckhead v. Brown*, 5 Hill, 641; Story on Bills; see Beawes's Lex Merc. 444.

But these general letters of credit may be subdivided into two kinds, those that contemplate a single transaction, and those that contemplate an open and continued credit, embracing several transactions. In the latter case, they are not generally confined to transactions with a single individual, but

if the nature of the business which the letter of credit was intended to facilitate requires it, different individuals are authorized to make advances upon it, and it then becomes a several contract with each individual to the amount advanced by him. Thus a general letter of credit may be issued to a person to enable him to purchase goods in the city of New York, for a country store. The very nature of the business requires him to deal with different individuals and houses in order to obtain the necessary assortment. It has never, as I am aware, been questioned that the guarantor might be bound to several persons who should furnish goods upon the credit of the letter.

So, letters are issued by commission houses in the city, to enable persons to purchase produce in the western states. The money is obtained from the local banks in those states by drafts drawn upon those houses, and upon the faith of the letters of credit. It may often happen that a single bank cannot furnish the requisite amount, or it may be necessary to use money in different and distant localities. I am not aware of any question ever having been raised as to the authority of different banks to act upon the same letter of credit. It is absolutely necessary that such should be the effect of them in order to facilitate the commerce of the country, and to carry out the object of the parties in issuing the letters of credit: *Birckhead v. Brown*, 5 Hill, 641; *Russell v. Wiggin*, 2 Story, 214.

The letter of credit in this case was evidently intended to be general; it did not contemplate a single transaction, or draft for the whole amount, but several drafts limited in the aggregate to twenty-five thousand dollars. Although the address, "sir," and "your bank," is in the singular number, yet I think it was intended to be used in a distributive sense, and apply to any bank or banks who should purchase the drafts. I can see no object which the drawers should have for limiting the party for whose benefit the letter was issued to a single bank. It is said that it would enable them more readily to revoke the authority. But these letters are not issued without either undoubted confidence in the persons for whose benefit they are drawn, or upon ample security. The idea of giving notice of revocation to any party but that for whose benefit they are drawn, is never entertained by the guarantors in cases of general letters. When they wish to provide for any such contingency, the letters are framed accordingly. Again, in this case, the parties themselves have treated this letter as not limited to a single bank, for they accepted bills which had been discounted by the plaintiffs.

I am therefore satisfied that the plaintiffs were authorized to purchase bills upon the faith of the letter and accompanying guaranty, and that the previous purchase of bills by another bank is no defense.

Whether the letters had been revoked with the knowledge of the plaintiffs before the draft was discounted by them, was a question of fact for the jury. It would clearly constitute no defense unless the plaintiffs had notice of it. The judgment of the superior court must therefore be affirmed with costs.

Judgment affirmed.

PROMISE TO ANSWER FOR DEBT OF ANOTHER, when required to be in writing, expressing the consideration, and when not: See *Barber v. Bucklin*, 43 Am. Dec. 726; *Spann v. Baltzell*, 46 Id. 346; *Durham v. Arledge*, 47 Id. 544; *Tindal v. Touchberry*, 49 Id. 637; *Beaman v. Russell*, Id. 775, and cases cited in the notes thereto. In *Kypfer v. Bank of Galena*, 34 Ill. 350, it is held, citing the principal case, that drafts drawn under a letter of credit are regarded as accepted drafts, and the acceptor is primarily liable, but a promise by any other person to pay them is a collateral promise, and must be proved to be made in writing.

SUFFICIENCY OF EXPRESSION OF CONSIDERATION IN GUARANTY.—In *Wilson v. Roberts*, 5 Bosw. 109, the principal case is cited to the point that under the statute of frauds the promise to answer for another's engagement must either state the consideration in direct and intelligible language, or its terms must be such as to import what the precise consideration is, as clearly as if formally and directly stated. Upon the point that where a guaranty is executed at the same time with the principal contract, as part of the same transaction, and a consideration is expressed in the principal contract, it is sufficient to support the guaranty, the case is followed in *Marsh v. Chamberlain*, 2 Lans. 293; *Grant v. Hotchkiss*, 15 How. Pr. 294; S. C., 26 Barb. 66; *Dunning v. Roberts*, 35 Id. 469. But in *Draper v. Snow*, 6 Duer, 664, 665, S. C. affirmed in 20 N. Y. 337, it was held that a guaranty of a contract for the purchase of stock deliverable at a future day, though made at the same time as the original contract, was not supported by the consideration expressed in such original contract, and was void because it did not express the consideration, and the principal case was explained and distinguished. In *Church v. Brown*, 29 Barb. 486, 490, a guaranty indorsed upon an agreement for the sale of goods at the time of its execution, as follows: "I will be responsible for all such goods as Mr. White shall buy of the Messrs. Church within one year from date, which shall not be paid for according to the terms of the within contract," was held void, as not expressing the consideration, and the principal case was referred to as being overruled on this point by *Brewster v. Silence*, 8 N. Y. 207. But this decision was reversed in *Church v. Brown*, 21 Ill. 315, 316, and the guaranty was held sufficiently to express the consideration, without reference to the principal contract, and the doctrine of *Union Bank v. Coster*, as to what is to be deemed a sufficient expression of the consideration to satisfy the statute, was commented on and approved; and on the other hand, *Brewster v. Silence* was disapproved by Comstock, C. J., who delivered one of the opinions. In *Speyers v. Lambert*, 1 Sweeny, 344, S. C., 6 Abb. Pr. N. S. 317, 37 How. Pr. 323, in discussing the object of the statute of 1863, which amended the section of the statute

of frauds relating to personal contracts by omitting the words "expressing the consideration," Freedman, J., comments on the principal case, as well as *Draper v. Snow*, *Church v. Brown*, *Brewster v. Silence*, *supra*, and other New York cases, as showing how the law was before that amendment. As to when a guaranty may be upheld by the consideration of the principal contract, see *Reed v. Cutts*, 22 Am. Dec. 184.

CONTRACTS EXECUTED AT SAME TIME CONSTRUED TOGETHER, WHEN: See *Howell v. Howell*, 47 Am. Dec. 335, and note referring to prior cases in this series. In *Draper v. Snow*, 20 N. Y. 335, Selden, J., says that the decision in *Union Bank v. Coster*, cannot be sustained "upon the doctrine that different instruments made at the same time, in respect to the same matter, are to be read and construed together," because "one essential circumstance was wanting, viz., an identity of parties."

NECESSITY OF NOTICE OF ACCEPTANCE OF GUARANTY, or of demand and notice of non-payment, by principal to charge guarantor: See *Rapalye v. Bailey*, 8 Am. Dec. 199; *Allen v. Rightmere*, 11 Id. 288; *Gibbs v. Cannon*, Id. 699; *Woolley v. Sergeant*, 14 Id. 419; *Kincheloe v. Holmes*, 45 Id. 41; *Whiton v. Mears*, Id. 233; *Mathews v. Chrisman*, 51 Id. 124, and cases cited in the notes thereto. That notice of acceptance of an absolute guaranty, not stipulating for notice, is not necessary to charge the guarantor, is held, citing *Union Bank v. Coster*, and many other cases, in *Wells, Fargo, & Co. v. Davis*, 2 Utah, 414. To the point that upon an absolute guaranty the guarantor is liable upon the original debtor's default, without proof of demand or notice, the principal case is cited with approval in *Winchell v. Doty*, 15 Hun, 4, and *Sterns v. Marks*, 85 Barb. 571, and *Howe Machine Co. v. Farrington*, 82 N. Y. 131. The case is referred to, also, in *Barhydt v. Ellis*, 45 Id. 111, as an authority for the doctrine that in any case a guarantor is not discharged by want of notice, unless he has suffered loss or damage, and only to the extent of such loss or damage. In *McKennis v. Ward*, 58 Id. 553, it is held, citing *Union Bank v. Coster*, that even in the case of a continuing guaranty it is not necessary to give the guarantor notice of the advances made from time to time upon the contract, and that no notice is required until a reasonable time after the principal's default, or after the whole transaction is closed, except in particular cases, as where doubtful contingencies are contemplated, and there is no liability until they occur.

THAT LETTER OF CREDIT ADDRESSED TO PARTICULAR PERSON is limited to him, and that the writer must be held to have granted it in reliance on his prudence and discretion, that such a letter contains no general power to interpose the writer's credit or transmit his guaranty, and that this is specially to be observed where the general terms of the letter make the personal limitation the only restraint on the writer's responsibility—is a principle to which *Union Bank v. Coster* is cited in *Barns v. Barrow*, 61 N. Y. 43. But in *Bissell v. Lewis*, 4 Mich. 457, the case is held not to support the doctrine that a letter of credit addressed to one by name is confined to him, and gives no one else a right to act under it. In *Evansville National Bank v. Kaufman*, 24 Hun, 614, where a letter of credit was to the following effect: "Any drafts that you may draw on Mr. A. F., of our city, we guarantee to be paid at maturity," and the letter, with certain drafts drawn thereunder, was presented by the parties to whom the letter was addressed to a certain bank which discounted the drafts, it was held, citing the principal case, that the guaranty was thereby attached to these specific drafts, and the general promise was, *pro hac vice*, reduced to one of personal undertaking with the discounting bank for their payment, if duly presented.

CLARK v. ROWLING.

[3 NEW YORK (3 COMSTOCK), 216.]

DISCHARGE IN BANKRUPTCY APPLIES TO JUDGMENT RECOVERED BEFORE DISCHARGE was granted, though after the petition filed, if the debt on which it is founded would have been barred by the discharge. The judgment is not deemed a new indebtedness created since the petition, but only a novation: so held under the bankrupt law of 1841.

BANKRUPT MAY SET UP DISCHARGE AS DEFENSE TO SUIT IN NATURE OF CREDITOR'S BILL to obtain satisfaction of the judgment; he is not confined to his remedy by motion.

COSTS INCLUDED IN JUDGMENT ARE ONLY ACCESSORY, and are discharged if the principal debt is discharged: so held as between the parties, not against the attorney.

APPEAL from a judgment of the supreme court reversing a decree of a vice-chancellor. The suit was a creditor's bill, to which the defense was a discharge in bankruptcy. This discharge was granted after the indebtedness of defendant to complainants was incurred, and after his action at law upon it had been begun; but as it was granted before recovery of the judgment on it, which was the foundation of this suit, the vice-chancellor refused to recognize it as a defense, for he considered the judgment as a new debt, created after the discharge. The supreme court reversed his decision, adopting the opinion in *Dresser v. Brooks*, 3 Barb. 429, as stating the grounds of decision.

Willard Crafts, for the appellants, the complaining creditors.

H. C. Van Schaack, for the respondent, the discharged debtor.

By Court, **HURLBUT, J.** In the year 1840, the defendants, John and Joseph Rowling, who were partners in the milling business in Madison county in this state, were indebted to the plaintiff and others in various sums, which were secured by seven promissory notes. In the year 1841, the plaintiff instituted a suit upon these notes, and after some litigation, finally obtained a verdict upon them on the eighteenth day of April, 1843, for the sum of nine hundred and twenty-nine dollars and twenty-seven cents, upon which a judgment was perfected on the thirteenth day of May of that year for one thousand and fifty-two dollars and seventy-five cents, including one hundred and twenty-three dollars and forty-eight cents as costs of suit; and execution was returned unsatisfied in the month of August thereafter.

The present suit was commenced in the late court of chancery on the seventh day of February, 1845, by bill in the usual

form of a creditor's bill, for the purpose of obtaining satisfaction of the judgment out of the property of the defendants, which the plaintiff had not been able to reach by execution at law.

The defendant John Rowling, jun., set up in his answer that on the twenty-ninth day of December, 1842, he duly presented his petition to the district court of the United States for the northern district of New York, and applied for the benefit of the bankrupt act of 1841. That such proceedings were thereupon had, that he was duly declared a bankrupt, and afterwards on the tenth day of July, 1843, a decree was made by that court whereby he was fully discharged from all the debts owing by him at the time of the presentation of his petition, and a certificate of such discharge was duly granted him. A like defense was set up by the answer of Joseph Rowling, except that his petition in bankruptcy was presented on the twenty-seventh day of January, 1843, and his discharge was granted on the twenty-fifth day of August of the same year.

It therefore appears from these answers, that the suit at law was pending on the notes when the defendants respectively presented their petition in bankruptcy, and that their certificates of discharge were granted, the one in about two and the other in about three months after the judgment was perfected. There was no opportunity for them to plead their discharge during the pendency of the suit at law; and the question now presented is, whether in answer to this bill, which is a species of equitable suit upon the judgment, the defendants can set up their discharge with the same effect as in an action on the notes upon which the judgment was founded; it not being denied that the discharge operated upon the debt which was secured by the notes—the same being provable under the proceedings in bankruptcy—but the plaintiff contending that the notes were merged in the judgment; that the latter is a new debt which did not exist at the time the bankrupts petitioned, and that therefore it ought not to be affected by their discharge.

It is true that the notes as evidence of an indebtedness were merged in the judgment; which being greater security, operated to extinguish the lesser; but does it therefore follow that the judgment to all intents became a new debt, and that the merger or extinguishment of the notes was so complete as that for the purpose of protecting the defendants in an equity connected with their original indebtedness, we may not look behind the judgment and see upon what it was founded? A judgment, in-

stead of being regarded strictly as a new debt, is sometimes held to be merely the old debt in a new form, so as to prevent a technical merger from working injustice. And this exception to the doctrine contended for by the plaintiff has obtained, especially in cases of insolvency and bankruptcy, for the protection as well of the creditor as of the debtor, and has been applied impartially for the benefit of both. An example in favor of the creditor is found in the case of *Wyman v. Mitchell*, 1 Cow. 816. This was an action of debt on a judgment of the supreme court of this state, of August term, 1816; the plea was that the defendant, on the thirtieth day of December, 1817, was discharged under the insolvent act of this state of 1813; to which there was a replication that the judgment declared on was rendered on a judgment obtained in the year 1814, in the court of common pleas of Cumberland, in the state of Maine, which last judgment was rendered upon certain notes made by the defendant to the plaintiff, in the state of Maine, prior to the New York insolvent act of 1813. And the court held that although the original undertaking of the defendant was so merged in the judgment that no suit could be maintained upon it, yet that it was proper to inquire into the time and circumstances of the contract upon which the first judgment was founded, for the purpose of taking the case out of the operation of the defendant's discharge. See also *Raymond v. Merchant*, 3 Cow. 147. An example of a similar kind, but in favor of the debtor, may be found in the case of *Betts v. Bagley*, 12 Pick. 572, which was an action of debt on a judgment recovered in October, 1823, in the court of common pleas of Berkshire county, in the state of Massachusetts. The defendant pleaded, with proper averments, a discharge under the insolvent laws of the state of New York of 1813, which was granted on the seventeenth day of May, 1828, but which could not have operated upon a judgment in the state of Massachusetts, unless the court had inquired into the circumstances of the case and the nature of the debt upon which the judgment was founded. Upon such inquiry, it appeared that when the suit was commenced in the common pleas of Berkshire, and the original judgment was rendered, both parties were citizens of this state, and that the judgment was upon promises made and to be executed here; and under these circumstances the court gave effect to the defendant's discharge, refusing to carry the technical doctrine of merger to such extent as to defeat the equities of the defendant arising from the nature and circumstances of the original debt.

We have been referred to cases of bankruptcy in England, where the judgment was obtained before the certificate on a debt which existed previous to the bankruptcy, so that the defendant had no opportunity to plead his discharge, and where the courts have given effect to the discharge on motion. But as this practice was expressly enjoined by the thirteenth section of the statute of 5 Geo. II., entitled an "act to prevent the committing of frauds by bankrupts," and other bankrupt acts, many of the cases cited do not come with the same authority as if they had been determined in administering the common-law powers of the British courts. Some of these cases, however, base the relief which is granted to the bankrupt, under such circumstances, upon broader ground: See *Lister v. Mundell*, 1 Bos. & Pul. 427. This was an application to have a writ of *fieri facias* set aside and the goods and money levied under it restored to the defendant, on the ground of his having become a bankrupt subsequent to the time when the cause of action accrued, and having obtained his discharge after the *fi. fa.* was issued. The court entertained the motion rather than drive the defendant to his *audita querela*, saying that by the modern practice, the defendant might obtain the same relief as by *au. quer.* in a summary way. But upon its being suggested by counsel that for a particular cause stated the defendant was deprived of the benefit of the bankrupt act, and that he had frequently promised payment since his certificate; the court said that when they entertained summary jurisdiction, in order to relieve a party from the necessity of having recourse to an *au. quer.*, they would look into the circumstances of the case, and see whether there was anything to prevent the *au. quer.* from taking effect; and ordered the rule to stand over, the plaintiff to deliver a declaration, and the defendant to plead his certificate; and the parties to go to trial at the ensuing assizes.

An *audita querela* lay in behalf of a defendant in a judgment to be relieved upon good matter of discharge which happened after the judgment, but which he had no opportunity of pleading. It was in the nature of a bill in equity, and was a writ of the most remedial nature, "and seems to have been invented," says Blackstone, "lest in any case there should be an oppressive defect of justice where a party who hath a good defense is too late to make it in the ordinary forms of law:" 8 Bla. Com. 406, 407. The relief formerly procured by this writ is now obtained summarily by motion; and yet it often happens that complete justice cannot be administered in this

summary manner, and the courts are compelled to frame an issue, or to direct an action to be brought, in order to determine the rights of the parties, as was done in the case of *Lister v. Mundell*, 1 Bos. & Pul. 427. But an issue thus joined has no higher merit than if it were framed by the voluntary act of the parties themselves; and if in a suit upon a judgment, they frame an issue presenting the identical questions which might be raised upon a summary application, it is difficult to perceive any well-founded objection to their determination in such suit.

The defendants in the present case, instead of moving summarily for the relief, to which it appears they would have been entitled, awaited the action of the plaintiff; and when he instituted an equitable suit upon the judgment, they set up in their answer by way of defense the very matter upon which they might formerly have been relieved by *au. quer.* or according to the present practice, by motion. The court was thus relieved from the burden of framing an issue to determine the validity of the discharge—it was presented to them by the pleadings in this suit—the plaintiff having asserted by his bill that the debt secured by his judgment was a valid and subsisting demand against the defendant, and of which he was entitled to satisfaction out of their assets; and the defendant having answered that the judgment was discharged by the decree in bankruptcy.

The issue thus presented was as complete as could be framed for the purpose of testing the effect of the defendant's discharge, and I am satisfied that the court below were correct in entertaining it.

The leading cases to which we were referred in support of the plaintiff's case do not uphold it. In *Birch v. Sharland*, 1 T. R. 715, the bankrupt, after his bankruptcy, gave a bond and warrant of attorney to confess judgment, which was held not to be barred by his certificate, although the original debt was contracted before; because the judgment was regarded as a new debt, arising upon a new consideration, the bond and warrant of attorney having been given in order to procure the defendant's liberty.

In *Thompson v. Hewitt*, 6 Hill, 254, the defendant moved for a perpetual stay of execution upon the judgment in that suit, on the ground that he had obtained a discharge as a voluntary bankrupt. The action was commenced in May, 1842, to recover the amount of a promissory note; on the ninth of January, 1843, the defendant presented his petition in bankruptcy; on

the sixth of May following, his attorney gave a *relicta* and *cognovit*, and judgment was perfected on the twenty-ninth of July. On the seventh of August following, the defendant obtained his discharge. It appeared, however, that the *cognovit* was given and received as a compromise for a less sum than was claimed to be due, and upon the express understanding that any discharge in bankruptcy which the defendant might obtain should not affect the judgment. And the court refused to grant the defendant a favor in direct violation of his agreement, and under the circumstances of the case, treated the judgment which was entered on the *cognovit* as a new debt which was not affected by the discharge; and it would seem there was enough in the case to enable the court to do so, upon the principle which obtained in *Birch v. Sharland*, without determining that the judgment, divested of the circumstances under which it was rendered, was, of itself, a new debt.

The case of *Kellogg v. Schuyler*, 2 Denio, 73, in strictness decided no more than that a cause of action in trespass was not affected by a discharge in bankruptcy, although a verdict had been rendered before the presentation of the petition to be declared a bankrupt; which is in harmony with all the cases.

The case of *Steward v. Green & Bannister*, 11 Paige, 535, arose upon a creditor's bill, and the chancellor intimated, although he did not definitely pass upon the point, that the bankrupt's discharge of the defendant Bannister, which was obtained more than a month before the recovery of the judgment against him, could not avail him in the court of chancery while that judgment remained in full force; and that he ought to have pleaded his discharge in bar of the further maintenance of the suit at law. And this may be conceded where the defendant has an opportunity for that purpose, which was not the case of the defendants in this suit. It seems, however, from subsequent decisions in the late court of chancery, that but for such opportunity of Bannister to plead his discharge at law, it would have been held a good answer to the plaintiff's bill in the suit referred to. For in *Johnson v. Fitzhugh*, 3 Barb. Ch. 360, the chancellor held that although to a certain extent a judgment technically changed the nature of a debt, yet its identity still remained, so far as that, if contracted previously to the institution of proceedings in bankruptcy against the debtor, it would be barred by a discharge obtained after the entry of the judgment: See also *Penniman v. Norton*, 1 Barb. Ch. 246.

As to the costs which were added to the original debt by the

plaintiff's proceeding to judgment, these have always, in cases of bankruptcy, been regarded as accessory to the debt, and as standing upon the same foundation in reference to the discharge: *Blandford v. Foote*, Cowp. 138; *Graham v. Benton*, 1 Wils. 41.

On the whole, I think it may be held, both upon principle and authority, that the bankrupt discharges which the defendants have set up in their answers, are available as a defense to this suit. The decree of the supreme court must be affirmed.

BRONSON, C. J., delivered a dissenting opinion.

WHETHER JUDGMENT RECOVERED AGAINST BANKRUPT AFTER PETITION AND BEFORE DISCHARGE IS BARRED by the discharge, is a question upon which there has been considerable difference of opinion. The solution of this question depends in a great measure upon the extent to which the doctrine of merger is permitted to operate upon a cause of action which has passed into judgment. The general rule is, that "every judgment is, for most purposes, to be regarded as a new debt; the chief, and perhaps the only, exception being in cases where the technical operation of the doctrine of merger would produce manifest hardship, and even those cases are by no means universally excepted:" Freeman on Judgments, sec. 217. If this doctrine is allowed its full force in such cases, and if the effect of the discharge is limited to provable debts existing at the time of the petition, it is obvious that a judgment recovered after the petition is not barred, whether the original debt existed at the time of the petition or not, because the debt is lost in the judgment, and the judgment did not then exist. To avoid this result resort has, in many instances, been had to the expedient adopted in the principal case of holding a judgment not to be an absolute merger of the original debt, not a new debt, but a new security for the old debt. "In no class of cases has the technical operation of the doctrine of merger been so frequently limited as in those where the effect of a discharge of a debtor under laws for the relief of insolvents had to be determined:" Id., sec. 245.

IN SEVERAL STATES, BANKRUPT'S DISCHARGE IS HELD NO BAR TO JUDGMENTS RECOVERED AFTER PETITION filed and before discharge, though founded on provable debts antedating the petition, adhering to the rigid rule of merger above mentioned, in cases arising not only under the United States bankrupt act of 1841, but also under that of 1867: *Woodbury v. Perkins*, 51 Am. Dec. 51, and note; *Haggerty v. Amory*, 7 Allen, 460; *Cutter v. Evans*, 115 Mass. 27; *Fisher v. Foss*, 30 Me. 459; *Pike v. McDonald*, 32 Id. 418; *Uran v. Handlette*, 36 Id. 15; *Palmer v. Merrill*, 57 Id. 29; *McCarthy v. Goodwin*, 8 Mo. App. 380; *In re Gallison*, 5 Nat. Bank. Reg. 353. In *McCarthy v. Goodwin*, *supra*, the principal case is referred to as not having "commanded general assent," and the doctrine of the Massachusetts cases above cited is preferred. The Massachusetts decisions on this point are founded not only on the operation of the principle of merger, but also upon the fact that under the practice of the courts in that state the institution of proceedings in bankruptcy or insolvency may be suggested in a pending suit and the suit stayed on motion until the defendant can obtain his discharge, so that he has his "day in court:" *Haggerty v. Amory*, 7 Allen, 460; *In re Gallison*, 5 Nat. Bank. Reg. 353. The latter reason operates with especial force in cases under the bankrupt act of 1867, because that act expressly pro-

vided for a stay of proceedings in pending suits against the bankrupt until the question of discharge could be determined. And it was held in *Penny v. Taylor*, 10 Id. 200, that in such a case the bankrupt court could enjoin proceedings in a pending suit in a state court.

The reasons for the Massachusetts doctrine, that a judgment recovered against a bankrupt between the petition and discharge for a provable debt is not barred, are very clearly stated by Mr. Justice Lowell in a case arising under the act of 1867: *In re Gallison*, 5 Nat. Bank. Reg. 358. In that case, it was held that upon the recovery of such a judgment neither the debt nor the judgment could be proved, nor would be barred by the discharge, and that the creditor could not, therefore, oppose the discharge, and Judge Lowell said: "Not only the technical doctrine of merger is involved, but the defendant has had his day in court and one opportunity to plead this defense; and I take it to be a rule of the highest importance that a defense which might have been made to the original cause of action can never be made to the judgment. Now the bankrupt act provides most carefully for a stay of suit until the defendant's discharge is passed upon; giving, by fair implication, a power to the district court even to enjoin actions in the state courts, contrary to the general practice. All this is for the very purpose of enabling the bankrupt to plead his discharge. If he does not choose to avail himself of this right, what possible ground is there for saying that the judgment shall not bind him? Are we to inquire in each case why his plea was not set up, or why it was overruled? It may be that the state court was of opinion that the discharge, if granted, would be no bar. We cannot impeach their decision collaterally. It may be that the bankrupt intended not to set up the discharge against this creditor. We cannot authorize him to reconsider this determination; it may be that he was surprised. If there were any failure of justice in the particular case, the remedy must of course be found with the tribunals of the same jurisdiction. Until they have reversed or set aside the judgment it operates as a new contract, and cannot be barred by a discharge which distinctly relates, as does this, to a date two years earlier."

Even where the debt upon which the judgment was recovered was actually proved in the bankruptcy proceedings, and one of the creditor's attorneys was chosen assignee, and though the bankruptcy was suggested on the docket of the court in which the suit was pending, it was held that the judgment was not barred by the discharge, if the bankruptcy proceedings, the proof of the debt, etc., were not actually pleaded in the suit, and no stay of proceedings was had, when the suit was brought before the bankruptcy, and in the absence of fraud and collusion the judgment was decided to be conclusive; *Cutter v. Evans*, 115 Mass. 27. The jurisdiction of a state or territorial court in a pending suit is not divested by bankruptcy proceedings, and the court in which the suit is pending is not required to take notice of those proceedings unless they are properly pleaded: *Eyster v. Goff*, 91 U. S. 521; *Haber v. Klausberg*, 3 Mo. App. 342.

Where a judgment recovered in another state before the debtor's discharge in bankruptcy, but after the filing of the petition, either under the act of 1841, or under that of 1867, is sued on in Massachusetts, the discharge is no bar unless it is shown that the law of the state where the judgment was recovered is different from that of Massachusetts: *Bradford v. Rice*, 102 Mass. 472. But where it appears that the judgment would have been held barred in the state where it was recovered, it will be held barred also in Massachusetts: *Haggerty v. Amory*, 7 Allen, 458.

GREAT PREPONDERANCE OF AUTHORITY IS IN FAVOR OF DOCTRINE OF PRINCIPAL CASE, that where a judgment is recovered against a bankrupt or

insolvent between the petition and discharge for a provable debt existing at the time of the petition, whether the discharge be under a state insolvent law or under the bankrupt act of 1841, or that of 1867, the judgment does not merge the original cause of action, so as to constitute a new debt, but is merely a new security for the old debt, and the former debt being barred by the discharge, the judgment is also barred, including costs: *McDougald v. Reid*, 5 Ala. 810; *Imlay v. Carpentier*, 14 Cal. 173; *Blake v. Bigelow*, 5 Ga. 437; *Anderson v. Anderson*, 65 Id. 518; S. C., 38 Am. Rep. 797; *Rogers v. Western etc. Ins. Co.*, 1 La. Ann. 161; *McDonald v. Ingraham*, 30 Miss. 389; *Thompson v. Hewitt*, 6 Hill, 254; *Johnson v. Fitzhugh*, 3 Barb. Ch. 360; *Dresser v. Brooks*, 3 Barb. 429; *Fox v. Woodruff*, 9 Id. 498; *Cromwell v. Gallup*, 17 Hun, 59; *Monroe v. Upton*, 6 Lana. 255, 256; S. C. affirmed in the court of appeals, 50 N. Y. 593, 597; *Dawson v. Hartsfield*, 79 N. C. 334; *Dick v. Powell*, 2 Swan, 632; *Stratton v. Perry*, 2 Tenn. Ch. 633; *Harrington v. McNaughton*, 20 Vt. 293; *Downer v. Rowell*, 26 Id. 397; *Stockwell v. Woodward*, 52 Id. 234. So under the English bankrupt acts such a judgment is discharged: *Dinsdale v. James*, 4 Moore, 350; S. C., 2 Brod. & B. 8. And the original debt is provable notwithstanding the judgment: *In re Brown*, 3 Nat. Bank. Reg. 584; S. C., 5 Ben. 1; *In re Vickery*, 3 Nat. Bank. Reg. 696; *In re Stevens*, 4 Id. 367; *In re Roscy*, 6 Ben. 507; S. C., 8 Nat. Bank. Reg. 509; *In re Vetterlein*, 13 Blatchf. 44; *contra: In re Williams*, 2 Nat. Bank. Reg. 78. Nor is it necessary to vacate the judgment before proving the debt: *In re Stevens*, 4 Id. 367. Indeed, the judgment itself may be proved: *In re Stansfield*, 4 Saw. 334; *Ex parte Birch*, 7 Dow. & Ry. 436; S. C., 4 Barn. & Cress. 880. And the creditor has such standing that he may oppose the debtor's discharge: *In re Stansfield*, *supra*.

The fact that the pendency of the bankruptcy or insolvency proceedings is not pleaded or suggested in the action in which the judgment is recovered will not prevent the discharge from being a bar: *Rogers v. Western etc. Ins. Co.*, 1 La. Ann. 161; *Anderson v. Anderson*, 65 Ga. 518; S. C., 38 Am. Rep. 797. To avail himself of the benefit of the discharge, the debtor may plead it to an action on the judgment in the same or another state: *Dresser v. Brooks*, 3 Barb. 429; *Anderson v. Anderson*, *supra*; or to a bill to enforce the judgment: *McDonald v. Ingraham*, 30 Miss. 389; or to a motion for leave to issue execution thereon: *Dawson v. Hartsfield*, 79 N. C. 334; or may have a perpetual stay of execution: *Imlay v. Carpentier*, 14 Cal. 173; *Mechanics' etc. Ass'n v. Lawrence*, 1 Sandf. 659; or an execution issued on the judgment may be quashed or set aside on motion: *Cogburn v. Spence*, 50 Am. Dec. 140; *McDougald v. Reid*, 5 Ala. 810; *Whiting v. Peck*, 17 Id. 339; *Imlay v. Carpentier*, 14 Cal. 173. In the case last cited, it is held also that the judgment itself may be discharged on motion, but the contrary is held in *Mechanics' etc. Ass'n v. Lawrence*, 1 Sandf. 659. In *Imlay v. Carpentier*, *supra*, it is further held that equity has no jurisdiction in such a case to enable the debtor to avail himself of his discharge, because his legal remedies are ample. But in *Stratton v. Perry*, 2 Tenn. Ch. 633, it is decided that the debtor may have an injunction against the judgment. Under the English bankrupt act, 24 & 25 Vic., c. 134, sec. 162, it is expressly provided that a bankrupt arrested or detained in custody after his discharge under a judgment, recovered before the discharge takes effect, for a provable demand, may be discharged, without fee, by the court or by a judge of any superior court of law upon proof of the order of discharge, unless good cause appears to the contrary: 5 Jac. Fish. Dig. 7246. So the court could thus discharge a debtor taken in execution on such a judgment under the act of 5 Geo. II., c. 30, sec. 13, and subsequent acts: *In re Gallison*, 5 Nat. Bank. Reg. 356; *Sadler v. Cleaver*, 7 Bing. 769;

S. C., 5 Moo. & P. 706; *Holding v. Impey*, 7 Moore, 614; S. C., 1 Bing. 189; *Robinson v. Vale*, 4 Dow. & Ry. 430; S. C., 2 Barn. & Cress. 769; *Simpson v. Mirabita*, L. R. 4 Q. B. 257; S. C., 10 B. & S. 77; 38 L. J. Q. B. 76; 20 L. T. N. S. 275. Or the court could stay proceedings before judgment to await the determination of the question of discharge: *Sadler v. Cleaver*, 7 Bing. 769; S. C., 5 Moo. & P. 706.

A decree of foreclosure of a mortgage, after an adjudication of bankruptcy and the appointment of an assignee, but before discharge, in a suit pending at the time of the petition, where the assignee does not apply to be made a party and is not made a party to the suit, is nevertheless binding, and a purchaser thereunder acquires a good title: *Eyster v. Goff*, 91 U. S. 521. So where a decree of foreclosure was rendered pending proceedings in bankruptcy, the assignee not intervening, it was held that he thereby agreed to that mode of ascertaining the value of the property, and the amount of the debt, and the creditor was permitted to prove for the balance after applying the proceeds of the sale: *In re Stansfield*, 4 Saw. 334. So a judgment in an attachment suit, where the attachment was laid more than four months before the bankruptcy proceedings, under the act of 1867, where the assignee interposed no defense and took no steps to transfer the proceeding to the bankruptcy court, the judgment was held binding, and a purchaser thereunder was protected: *Doe v. Childress*, 21 Wall. 642. But where a creditor laid his attachment within four months of the bankruptcy proceedings, and obtained his judgment before the discharge, it was held that he acquired no additional rights by his judgment: *Cromwell v. Gallup*, 17 Hun, 59, citing the principal case. It is obvious that, in cases of this sort, where the proceeding is *in rem*, a decree or judgment may be held binding, so far as the property is concerned, without militating against the rule of the principal case, that the debtor is personally discharged from a judgment recovered for a provable debt recovered after the petition and before his discharge.

Where a judgment is taken by way of a compromise for a less sum than the plaintiff's demand, pending bankruptcy proceedings, with an agreement that the discharge shall not affect it, the debtor, after his discharge, will not be relieved against such judgment by a perpetual stay of execution: *Thompson v. Hewitt*, 6 Hill, 254. Where a suit is stayed pending bankruptcy proceedings on the part of the defendant, and the stay is afterwards vacated on the application of the plaintiff to the court of bankruptcy, on the ground of the defendant's laches in not applying for his discharge within the time prescribed by law, and the suit is then prosecuted to judgment, such judgment will not be affected by the subsequent discharge, being deemed excepted from its operation by the order vacating the stay: *McDonald v. Davis*, 26 Hun, 53.

If a judgment recovered before the defendant's discharge is set aside and a new trial granted, no doubt the discharge may then be pleaded in bar: *Humble v. Carson*, 12 Nat. Bank. Reg. 84. But where a defendant having appealed from a judgment against him afterwards obtains his discharge in bankruptcy, it is held, in *Burnett v. Waddell*, 54 Tex. 562, that he cannot have the suit dismissed on motion; *contra*: *Haggerty v. Morrison*, 59 Mo. 324. A default entered against a bankrupt before his discharge, it is held in *New Hampshire etc. Bank v. Webster*, 48 N. H. 21, will be set aside on terms to enable him to plead his discharge. But the contrary is held in *Park v. Casey*, 35 Tex. 536. If the default is not set aside, and judgment is entered thereon after the discharge, it is held, in *Hollister v. Abbott*, 31 N. H. 442, to be conclusive until vacated or set aside.

DEMAND MUST BE PROVABLE AT TIME OF PETITION OR JUDGMENT WILL NOT BE BARRED which is recovered thereon after the petition and before the discharge. A judgment so recovered for a debt contracted after the petition is not barred. So held under the act of 1841, in *McNeilly v. Richardson*, 4 Cow. 607. Hence a judgment recovered after the petition is filed and before discharge for a tort or claim *ex delicto* existing before the filing of the petition is not discharged, because until such claim is reduced to judgment it is not a provable debt: *Bump's Bankruptcy*, 9th ed., 576; *In re Hennocksbrough*, 6 Ben. 150; 7 S. C., Nat. Bank. Reg. 37; *Ellis v. Ham*, 28 Me. 385. So, even though a verdict is obtained before the commission of the act of bankruptcy, or the commencement of the bankruptcy proceedings where the judgment is not rendered until afterwards, because a verdict does not constitute a debt: *Kellogg v. Schuyler*, 2 Denio, 73; *Nassau v. Parker*, 2 Penn. L. J. 298; *Black v. McClelland*, 12 Nat. Bank. Reg. 481; *In re Charles*, 14 East, 198; *Buss v. Gilbert*, 2 Man. & Sel. 70; *In re Newman*, L. R. 3 Ch. Div. 494; but see *Robinson v. Vale*, 4 Dow. & Ry. 430; S. C., 2 Barn. & Cress. 762; and *Beaton v. White*, 7 Price, 209. So, where the cause is tried before referees and the report is agreed on, but not signed before petition: *Crouch v. Gridley*, 3 Hill, 250. Of course if the judgment as well as the verdict is obtained in an action of tort before the commencement of the bankruptcy proceedings, it is barred by the discharge, because the judgment merges the tort and becomes a debt of record: *In re Sidle*, 2 Nat. Bank. Reg. 220; *Comstock v. Groat*, 17 Vt. 512; *In re Comstock*, 22 Id. 642; *Graham v. Pierson*, 6 Hill, 247.

A judgment for costs against the plaintiff in an action pending at the time of his petition in bankruptcy, recovered after the petition and before the discharge, is not barred, there being no provable debt at the time of the petition: *Gardner v. Lay*, 2 Daly, 113; *Wilkins v. Warren*, 27 Me. 438. So, also, under the English bankrupt acts prior to the act of 1869: *Robson on Bankruptcy*, 200; *Hassell v. Thorogood*, 7 Barn. & Cress. 705; even though the verdict was returned before the bankruptcy: *Oxlade v. North Eastern R. Co.*, 33 L. J. C. P. 171, a case arising under the act of 1861. But where there was judgment of nonsuit against the plaintiff before his bankruptcy, though the costs were not taxed until after the commission issued, they were held to constitute a provable debt, and therefore to be discharged: *Hurst v. Mead*, 5 T. R. 365; *Holding v. Impey*, 7 Moore, 614; S. C., 1 Bing. 189. We do not intend, however, to discuss the various and conflicting decisions under the different English bankrupt acts, as to when a claim for costs is to be deemed barred by the bankrupt's discharge.

Even though the cause of action upon which a judgment is recovered against a bankrupt, intermediate the petition and discharge, is of such a nature that the discharge will not bar it, the plaintiff may nevertheless, by the form of his action, estop himself from showing that fact so that the judgment will be barred. Thus where a debt was created by fraud, so as to be excepted from the operation of the bankrupt act of 1867, but the creditor sued in *assumpsit*, not alleging the fraud, and recovered judgment after the debtor's petition but before his discharge in bankruptcy, and after the discharge moved for leave to issue execution when the debtor pleaded his discharge, it was held, notwithstanding the doctrine of the principal case, that the creditor was estopped to go behind the judgment and show the fraud in the original transaction: *Sherman v. Strauss*, 2 Jones & S. 9.

MERGER OF CAUSE OF ACTION IN JUDGMENT: See *Napier v. Gidicre*, 49 Am. Dec. 613; *Wann v. McNulty*, 43 Id. 58; *Mathews v. Lawrence*, Id. 665; *Beall's Adm'r v. Taylor's Adm'r*, 44 Id. 398; *Wood v. Watkinson*, Id. 562, and

cases cited in the notes thereto. In *Conklin v. Field*, 37 How. Pr. 456, the principal case is cited to the point that a judgment upon a contract debt merges it, but not so completely that courts cannot look behind the judgment to the original cause of action for the purpose of protecting the rights of parties. Thus where a plaintiff sues for part of a note only, erroneously supposing the rest to have been paid, and recovers judgment, it is held in that case that such judgment will not prevent a subsequent suit for the residue. The case is cited also, and its doctrine applied, in *Wasser v. De Bann*, 2 E. D. Smith, 263, as to the right of a court to look behind the judgment to the origin of a transaction for the protection of the rights of parties. But in *Hammond v. Hoffman*, 2 Redf. 93, it is held that this principle cannot be applied where the judgment is for a tort, but that the judgment completely merges the cause of action.

WHERE FACTS ARISE AFTER JUDGMENT, or before such judgment but after the time has passed in which the party can avail himself of them, which are of such a nature that the judgment ought not to be enforced, relief may be had by motion to vacate or stay the judgment: *Wetmore v. Law*, 22 How. Pr. 130, 132; *Smith v. McCluskey*, 45 Barb. 617, both citing the principal case. Relief was formerly granted in such cases by *audita querela*, and a suit in equity in the nature of *audita querela* is still necessary in some instances: *Smith v. McClusky*, *supra*.

WILLIAMS v. HUTCHINSON.

[8 NEW YORK (8 COMSTOCK), 312.]

STEP-FATHER WHO ADOPTS CHILD OF HIS WIFE by her former husband, and maintains it as a member of the family, is not liable for wages for services which the child may have rendered during such relation, except on an express promise to pay.

PROMISE TO PAY FOR SERVICES RENDERED BETWEEN MEMBERS OF SAME FAMILY will not be presumed.

PERSON STANDING IN LOCO PARENTIS IS ENTITLED TO RIGHTS and subject to the liabilities of an actual parent, though not legally compelled to assume that relation.

INFANT MAY BIND HIMSELF BY CONTRACT CLEARLY BENEFICIAL to him.

APPEAL from a judgment of the supreme court in an action for wages. The defendant, having married the mother of minor sons (Charles and Daniel Williams), received the sons into his household and maintained them as members of the same family with children of his own by a former wife, and they rendered services to him in the management of his farm, etc. They afterward brought suit for wages for these services, and referees, to whom the suits were referred, made reports in their favor; but the court set the reports aside, delivering in one of the suits the opinion reported in 5 Barb. 122, and referring in the present case to that opinion as giving the reasons for rendering the same judgment in this.

Evert Van Buren, for the appellant, the son.

J. N. Whiting, attorney, and *Theron R. Strong*, of counsel, for the respondent, the step-father.

By Court, PRATT, J. It is well settled that a person is not entitled to the custody or earnings of the children of his wife by a former husband, nor is he bound by law to maintain them; but these principles alone are by no means decisive of the question now before us. The parent is not legally entitled to the custody or earnings of his children after they arrive at the age of twenty-one; nor is he entitled to the earnings of, or bound to maintain, his nephews or nieces; yet if they live with him as members of his family, without any contract or understanding that he shall pay for their services or receive pay for their maintenance, the law will not imply a promise to pay on either side: *Robinson v. Cushman*, 2 Denio, 149; *Andrus and Wife v. Foster*, 17 Vt. 558; *Fitch v. Peckham*, 16 Id. 150; *Swires v. Parsons*, 5 Watts & S. 357; *Candor's Appeal*, Id. 513; *Weir v. Weir*, 3 B. Mon. 645 [39 Am. Dec. 487].

The learned judge who wrote a dissenting opinion in the case of *Williams v. Hutchinson*, 5 Barb. 122, a younger child against the same defendant, conceded the law to be as held in those cases, when applied to adults; but he contended that when applied to cases of infants, who were not competent to contract or bind themselves, a different rule should prevail; that those cases proceed upon the principle that there is an understanding or assent to the arrangement, and a waiver of those legal rights which would otherwise exist; that as no such understanding or assent can be implied in the case of an infant, the law will imply a promise to pay whenever a benefit has been received. I cannot concur in the conclusion to which the learned judge arrived in that case.

1. A contract or promise to pay, as a matter of fact, requires affirmative proof to establish it. Under certain circumstances, when one man labors for another, a presumption of fact will arise that the person for whom he labors is to pay him the value of his services. It is a conclusion to which the mind readily comes from a knowledge of the circumstances of the particular case, and the ordinary dealings between man and man. But where the services are rendered between members of the same family, no such presumption will arise. We find other motives than the desire of gain which may prompt the exchange of mutual benefits between them, and hence no right

of action will accrue to either party, although the services or benefits received may be very valuable. And this does not so much depend upon an implied contract that the services are to be gratuitous, as upon the absence of any contract or promise that a reward should be paid. So far, then, as it depends upon any presumption of fact, the difficulty is as great or greater in the case of an infant than an adult.

2. But it is insisted that the law will imply a promise to pay in many cases, even against the will of the person sought to be charged, when reason and justice dictate that he should pay, and the reasoning of the dissenting judge is mainly based upon this proposition. The proposition is undoubtedly correct, but the difficulty is that it is not applicable to the circumstances of this case. If the facts of this case show that the defendant has received the valuable services of the plaintiff for which he has rendered no corresponding benefit, different considerations might arise. But is that so? Is the calculation in dollars and cents the only consideration which this court is authorized to take of this case? The plaintiff, at the tender age of eleven years, was adopted into the family of the defendant, and treated in all respects as one of his own children. Suppose at that time the alternative had been presented to some friend of the child, whether he should be cast into the world to take care of himself, or follow his mother into the family of the defendant, to be clothed, educated, and cared for; nay more: suppose the alternative had been presented to that friend, whether the child should follow his mother and live in the family of the defendant until the age of nineteen, and be treated in all respects as the finding of the referee in this case shows he was treated, or go into the family of a stranger under an arrangement that he should receive pay for the value of his services, and be charged for everything which he received, would that friend have hesitated recommending the arrangement and disposition of the child which was actually made in this case, in preference to the one above supposed?

If we look at the actual result, the case is not changed. The referee, it is true, has found that in dollars and cents the value of the services exceeds the cost of maintenance; but these are not the only benefits which the plaintiff has received. There are considerations growing out of the relation which the parties sustain to each other which cannot be computed in money. To say nothing of the benefits derived from a father's care and a mother's love, of the thousand joys which can only be found

by the dutiful child in that sacred sanctuary called home, is it nothing to be trained up in those habits of industry, in that knowledge of business which fits a child for the actual duties of life? I should feel much more inclined to hold a man standing *in loco parentis* responsible, who had furnished his adopted child with all needful food, clothing and education, and had neglected to train him up in habits of industry; and yet, according to the doctrine contended for by the counsel for the appellant, the assumed parent could recover for necessities furnished under these circumstances. "A parent," says a commentator no less renowned for his great legal learning than for his just appreciation of the duties growing out of the family relations, "who sends his son into the world uneducated and without skill in any art or science, does a great injury to mankind as well as to his family, and defrauds the community of a useful citizen and bequeaths to it a nuisance; and it is said that Solon was so deeply impressed with the force of the obligation, that he even excused the children of Athens from maintaining their parents if they had neglected to train them up to some art or profession:" 2 Kent's Com. 195.

We therefore fail to find in this case that want of reciprocity in the benefits enjoyed by the parties growing out of the relation which existed between them, which would from dictates of reason and justice imply a promise to pay. It is not to be implied from the fact that the defendant has been benefited and not injured by his generosity; for it is a subject of gratification rather than regret that both parties have probably been benefited by the relation which has existed between them.

It is said that injustice might in some cases be done by one claiming the benefit of the parental relation, that he might receive the services of the child so long as he continued in health, but if sickness should overtake him, or if for any cause he should be unable to render services which would be profitable to the parent, the latter might dissolve the relation, and compel the child to take care of himself. It will be time enough to decide that case when it arises. Our views in this case are based upon the assumption that the defendant stood *in loco parentis*, and has faithfully discharged the duties appertaining to that relation. Had he been guilty of flagrant injustice, had he failed to discharge faithfully the duties which he had assumed, different considerations would arise; but the case shows that the plaintiff was during the whole time treated in all respects the same as the other children of

the defendant, and there is no evidence that he did not, in all respects, discharge the duties of a father faithfully and honestly.

3. The counsel for the appellant assumes that the plaintiff, because he was an infant, could not consent to any arrangement by which he should waive the right to claim wages for his services. This is not correct. An infant may enter into a binding contract which is clearly for his benefit: 2 Kent's Com. 236; *United States v. Bainbridge*, 1 Mason, 82; *Keane v. Boycott*, 2 H. Black. 511; *Maddon v. White*, 2 T. R. 161. He may contract for necessities, or bind himself as an apprentice, and will not be allowed to avoid his contract: *Rex v. Inhabitants of Great Wigston*, 3 Barn. & Cress. 484. It being clearly for the benefit of the infant that he should be provided with a home, any contract beneficial to himself which he might make for that purpose would be binding. This case would therefore come directly within the principle decided in the cases first cited, and which are conceded by the counsel for the appellant to be founded in correct legal principles.

4. The authorities sustain the positions we have taken. It has been frequently held that where a man stands *in loco parentis*, he is entitled to the rights and subject to the liabilities of an actual parent, although he was not legally compelled to assume that relation. Thus he can sustain an action for seduction, and is not restricted to the actual damages sustained for the loss of service, but the same rule of damages applies as in the case of an actual parent.

So he is liable for necessities furnished to a child standing in that relation, to the same extent that he is liable for necessities furnished to his own.

The policy of the law seems to be to encourage and protect that relation—to encourage an extension of the circle and influence of the domestic fireside. And unless compelled by some rigid rule of law, we should not by our decision establish a rule calculated to deter the husband from adopting his wife's children, by a former marriage, into his family. The marriage with the mother, it has been held, severs the relation which would otherwise exist between her and her children, as guardian of their persons. If, therefore, the husband voluntarily adopts them into his family, educates and supports them, and discharges his whole duty towards them as a parent and a good citizen, the law should be liberally construed in his favor. It is a disposition of the children which must add vastly to the happiness of the mother, and to the children its

advantages can scarcely be estimated. In the language of the same learned commentator cited above, "under the thousand pains and perils of human life, the home of the parents is to the children a sure refuge from evil and a consolation in distress."

We are of opinion, therefore, that the judgment of the supreme court should be affirmed.

Judgment affirmed.

STEP-FATHERS, RIGHTS AND LIABILITIES OF: See *Gay v. Ballou*, 21 Am. Dec. 158, and note. See also *Bartley v. Richtmyer*, *post*, p. 338, and note discussing this subject. That a step-father taking a child of his wife by a former husband into his own family stands *in loco parentis* to such child, and in the absence of any express agreement to the contrary is entitled to its services and liable for its maintenance, is a point upon which *Williams v. Hutchinson* is cited with approval in *Mulhern v. McDavitt*, 16 Gray, 406; *Gerdes v. Weiser*, 54 Iowa, 593; *Russell v. Switzer*, 63 Ga. 723. The case is distinguished on the same point in *Hill v. Hanford*, 11 Hun, 538, where its doctrine is admitted to be sound.

SERVICES DEEMED GRATUITOUS, AND NO PROMISE IMPLIED to pay therefor, when: See *James v. O'Driscoll*, 1 Am. Dec. 632; *Jacobs v. Ureuline Nuns*, 5 Id. 730; *Bartholomew v. Jackson*, 11 Id. 237; *Weir v. Weir's Adm'r*, 39 Id. 487. That services rendered by a son to his father will not be deemed gratuitous where there was an understanding that they were to be paid for, and no provision was made for the son in the father's will, see *Price v. Price*, 34 Id. 608. So, that services rendered under a mutual understanding that the party rendering them is to receive a legacy, will not be deemed gratuitous where no legacy is given: See *Martin v. Wright's Adm'rs*, 28 Id. 468, and note; see also *Roberts v. Swift*, 1 Id. 295. To the point that where services are rendered between members of the same family, living together, as by a son or daughter to a father, or the like, they are in general deemed to be gratuitous, and the law will not imply a promise to pay for them, the principal case is cited and approved in *Keller v. Stuck*, 4 Redf. 297; *Eitel v. Walter*, 2 Bradf. 290; *Bowen v. Bowen*, Id. 368; *Shirley v. Vail*, 38 How. Pr. 408; *Van Kuren v. Saxton*, 5 Thomp. & C. 567; S. C., 3 Hun, 547; *Sullivan v. Sullivan*, 6 Id. 658; *Lind v. Sullestadt*, 21 Id. 368; *Robinson v. Raynor*, 28 N. Y. 505, *per* Mullin, J., dissenting; *In re Kelly's Estate*, Tuck. 30. And the same principle applies where support or maintenance is furnished by one member of a family to other members of the same family, all living together: *In re Teyn*, 2 Redf. 308. In *Raynor v. Robinson*, 36 Barb. 131, it was held, citing the principal case, that where an aged mother, abandoned by her husband, was for twenty-five years taken care of by her son and his family, who resided near her, they supplying her with provisions and performing various services for her, no account being kept or rendered therefor until after the death of the father and mother, the law would imply no promise to pay therefor which would enable the son to claim compensation out of the father's estate. But this decision was reversed in *Robinson v. Raynor*, 28 N. Y. 494, on the ground that the evidence showed that there was an understanding between the father and son that the latter was to be compensated by a devise of the family homestead, and that no devise having been made, the son was entitled to compensation. The principal case is cited and commented on in *Maltby v. Harwood*, 12 Barb. 478, as an authority for the general doctrine that the law will not imply a promise of

payment for services rendered under circumstances indicating that they were intended not to be paid for; as in case of a minor rendering services under indentures of apprenticeship which were afterwards declared void. So, where a physician renders professional services to his father's family, without intending to charge for them, and afterwards presents a claim against the father's estate: *Ross v. Ross*, 6 Hun, 185. In *Shakespeare v. Markham*, 10 Id. 311, 323, it is held, citing the principal case, that where services are rendered in expectation of receiving a legacy, and no legacy is given, compensation cannot be obtained therefor out of the decedent's estate, without proof of a contract or understanding, express or implied, between the decedent and the claimant that the legacy is to be given. The case is also cited and commented on in *Gallagher v. Vought*, 8 Id. 89; and it is held that the only exception to the general rule that where services are rendered by one person to another without an express agreement to pay for them, the law will imply a promise to pay their reasonable value, as where the parties are near relatives and members of the same family, and this exception is said not to apply where the only relationship between the parties is that the plaintiff's wife and the defendant's mother are cousins. The principal case is distinguished also in *Lewis v. Trickey*, 20 Barb. 391, and its doctrine is held not to be applicable where a minor renders service as a hired servant, and that it is no defense to the employer that he agreed to make payment to one who had no right to the minor's services. The doctrine was held not to be applicable also where a son-in-law was employed by his father-in-law at stipulated monthly wages for eight months, and continued to work for eight years without any further agreement, and it was decided that he could recover the reasonable value of the services: *Conger v. Van Aernum*, 43 Barb. 607. In *Raymond v. Loyl*, 10 Id. 486, the case is referred to as not raising the question as to the liability of parent to a third person for necessities furnished to his child without a contract.

PERSON STANDING IN LOCO PARENTIS, BEING SUBJECT to the liabilities and entitled to the rights of an actual parent, cannot sue the child or its parent for the child's support, and is not liable for services rendered by it: *Chilcott v. Trimble*, 13 Barb. 507, citing the principal case. In *Certeoll v. Hoyt*, 6 Hun, 581, the principal case is cited to the point that one standing in loco parentis to a seduced female may sue for her seduction: See on that subject the note to *Wenser v. Bachert*, 44 Am. Dec. 167.

SILSBURY v. McCOON.

[3 NEW YORK (3 COMSTOCK), 372.]

TITLE TO CHATTELS IS NOT CHANGED BY BESTOWAL OF LABOR or skill upon them, by a willful wrong-doer, in manufacturing them or changing them into a commodity of another kind. No matter how great the transformation may be, the true owner may follow and reclaim his materials as far as he can prove their identity.

WILLFUL TRESPASSERS TAKING CORN AND MAKING IT INTO WHISKY ACQUIRE NO TITLE, and can maintain no action against an officer seizing and selling the whisky in their distillery, on an execution against the owner of the corn.

ERROR to review a judgment of the supreme court in favor of plaintiffs in trover. The action was brought by Samuel W.

Silsbury and Mortimer Calkins against Cornelius McCoon and Benjamin B. Sherman. The evidence on behalf of plaintiffs showed that a deputy sheriff, holding an execution in favor of defendants and against one Wood, came to plaintiffs' distillery, seized a quantity of whisky as belonging to Wood, which he found there in plaintiffs' possession, and which they claimed as their own, and in spite of their objection sold it to defendants, who took it away. The defendants offered to prove that the whisky in question was made from corn which belonged to Wood, and which plaintiffs had taken with knowledge that it was his, and had manufactured without authority from him. The judge excluded this defense, holding that Wood's title to the corn must be deemed extinguished by its being transformed into whisky, and the plaintiffs had a verdict. On a motion for a new trial, the court sustained this ruling.

Nicholas Hill, jun., for the plaintiffs in error.

Marcus T. Reynolds, for the defendants in error.

By Court, RUGGLES, J. It is an elementary principle in the law of all civilized communities, that no man can be deprived of his property, except by his own voluntary act or by operation of law. The thief who steals a chattel, or the trespasser who takes it by force, acquires no title by such wrongful taking. The subsequent possession by the thief or the trespasser is a continuing trespass; and if, during its continuance, the wrong-doer enhances the value of the chattel by labor and skill bestowed upon it, as by sawing logs into boards, splitting timber into rails, making leather into shoes, or iron into bars or into a tool, the manufactured article still belongs to the owner of the original material, and he may retake it or recover its improved value in an action for damages. And if the wrong-doer sell the chattel to an honest purchaser having no notice of the fraud by which it was acquired, the purchaser obtains no title from the trespasser, because the trespasser had none to give. The owner of the original material may still retake it in its improved state, or he may recover its improved value. The right to the improved value in damages is a consequence of the continued ownership. It would be absurd to say that the original owner may retake the thing by an action of replevin in its improved state, and yet that he may not, if put to his action of trespass or trover, recover its improved value in damages. Thus far, it is conceded that the common law agrees with the civil.

They agree in another respect, to wit, that if the chattel

wrongfully taken afterwards come into the hands of an innocent holder, who, believing himself to be the owner, converts the chattel into a thing of different species, so that its identity is destroyed, the original owner cannot reclaim it. Such a change is said to be wrought when wheat is made into bread, olives into oil, or grapes into wine. In a case of this kind, the change in the species of the chattel is not an intentional wrong to the original owner. It is therefore regarded as a destruction or consumption of the original materials, and the true owner is not permitted to trace their identity into the manufactured article, for the purpose of appropriating to his own use the labor and skill of the innocent occupant who wrought the change; but he is put to his action for damages as for a thing consumed, and may recover its value as it was when the conversion or consumption took place.

There is great confusion in the books upon the question what constitutes change of identity. In one case, 5 Hen. VII., folio 15, it is said that the owner may reclaim the goods so long as they may be known, or in other words, ascertained by inspection. But this in many cases is by no means the best evidence of identity, and the examples put by way of illustration serve rather to disprove than to establish the rule. The court say that if grain be made into malt, it cannot be reclaimed by the owner, because it cannot be known. But if cloth be made into a coat, a tree into square timber, or iron into a tool, it may. Now, as to the cases of the coat and the timber, they may or may not be capable of identification by the senses merely; and the rule is entirely uncertain in its application; and as to the iron tool, it certainly cannot be identified as made of the original material, without other evidence. This illustration, therefore, contradicts the rule. In another case, Moore, 20, trees were made into timber, and it was adjudged that the owner of the trees might reclaim the timber, "because the greater part of the substance remained." But if this were the true criterion, it would embrace the cases of wheat made into bread, milk into cheese, grain into malt, and others which are put in the books as examples of a change of identity. Other writers say that when the thing is so changed that it cannot be reduced from its new form to its former state, its identity is gone. But this would include many cases in which it has been said by the courts that the identity is not gone; as the case of leather made into a garment, logs into timber or boards, cloth into a coat, etc. There is therefore no definite settled rule on this question; and although the want of such a rule may

create embarrassment in a case in which the owner seeks to reclaim his property from the hands of an honest possessor, it presents no difficulty where he seeks to obtain it from the wrong-doer; provided the common law agrees with the civil in the principle applicable to such a case.

The acknowledged principle of the civil law is, that a willful wrong-doer acquires no property in the goods of another, either by the wrongful taking or by any change wrought in them by his labor or skill, however great that change may be. The new product, in its improved state, belongs to the owner of the original materials, provided it be proved to have been made from them; the trespasser loses his labor, and that change which is regarded as a destruction of the goods, or an alteration of their identity, in favor of an honest possessor, is not so regarded as between the original owner and a willful violator of his right of property.

These principles are to be found in the digest of Justinian, lib. 10, tit. 4, leg. 12, sec. 8: "If any one shall make wine with my grapes, oil with my olives, or garments with my wool, knowing they are not his own, he shall be compelled by action to produce the said wine, oil, or garments." So in Vinnius's Institutes, tit. 1, pl. 25: "He who knows the material is another's ought to be considered in the same light as if he had made the species in the name of the owner, to whom also he is to be understood to have given his labor."

The same principle is stated by Puffendorf, in his Law of Nature and of Nations, b. 4, c. 7, sec. 10, and in Wood's Institutes of the Civil Law, p. 92, which are cited at large in the opinion of Jewett, J., delivered in this case in the supreme court, *Silbury v. McCoon*, 4 Denio, 338, and which it is unnecessary here to repeat. In Brown's Civil and Admiralty Law, p. 240, the writer states the civil law to be that the original owner of anything improved by the act of another, retained his ownership in the thing so improved, unless it was changed into a different species; as if his grapes were made into wine, the wine belonged to the maker, who was only obliged to pay the owner for the value of his grapes. The species, however, must be incapable of being restored to its ancient form; and the materials must have been taken in ignorance of their being the property of another.

But it was thought in the court below that this doctrine had never been adopted into the common law, either in England or here; and the distinction between a willful and an involun-

tary wrong-doer hereinbefore mentioned, was rejected not only on that ground, but also because the rule was supposed to be too harsh and rigorous against the wrong-doer.

It is true that no case has been found in the English books in which that distinction has been expressly recognized; but it is equally true that in no case until the present has it been repudiated or denied. The common law on this subject was evidently borrowed from the Roman at an early day; and at a period when the common law furnished no rule whatever in a case of this kind. Bracton, in his treatise, compiled in the reign of Henry III., adopted a portion of Justinian's Institutes on this subject, without noticing the distinction; and Blackstone, in his Commentaries, vol. 2, p. 404, in stating what the Roman law was, follows Bracton, but neither of these writers intimates that on the point in question there is any difference between the civil and the common law. The authorities referred to by Blackstone in support of his text are three only. The first in Brooks's Abridgment, tit. Property, 23, is the case from the Year Book, 5 Hen. VII., fol. 15 (translated in a note to 4 Denio, 335), in which the owner of leather brought trespass for taking slippers and boots, and the defendant pleaded that he was the owner of the leather, and bailed it to J. S., who gave it to the plaintiff, who manufactured it into slippers and boots, and the defendant took them, as he lawfully might. The plea was held good, and the title of the owner of the leather unchanged.

The second reference is to a case in Sir Francis Moore's reports, p. 20, in which the action was trespass for taking timber, and the defendant justified on the ground that A. entered on his land and cut down trees and made timber thereof, and carried it to the place where the trespass was alleged to have been committed, and afterwards gave it to the plaintiff, and that the defendant therefore took the timber as he lawfully might. In these cases, the chattels had passed from the hands of the original trespasser into the hands of a third person; in both, it was held that the title of the original owner was unchanged, and that he had a right to the property in its improved state against the third person in possession. They are in conformity with the rule of the civil law; and certainly fail to prove any difference between the civil and the common law on the point in question. The third case cited is from Popham's reports, p. 38, and was a case of confusion of goods. The plaintiff voluntarily mixed his own hay with the hay of

the defendant, who carried the whole away, for which he was sued in trespass; and it was adjudged that the whole should go to the defendant; and Blackstone refers to this case in support of his text, that "our law to guard against fraud gives the entire property, without any account to him whose original dominion is invaded and endeavored to be rendered uncertain without his own consent." The civil law in such a case would have required him who retained the whole of the mingled goods to account to the other for his share: Just. Inst., lib. 2, tit. 1, sec. 28; and the common law in this particular appears to be more rigorous than the civil; and there is no good reason why it should be less so in a case like that now in hand, where the necessity of guarding against fraud is even greater than in the case of a mingling of goods, because the cases are likely to be of more frequent occurrence. Even this liability to account to him whose conduct is fraudulent, seems by the civil law to be limited to cases in which the goods are of such a nature that they may be divided into shares or portions, according to the original right of the parties; for by that law, if A obtain by fraud the parchment of B and write upon it a poem, or wrongfully take his tablet and paint thereon a picture, B is entitled to the written parchment and to the painted tablet, without accounting for the value of the writing¹ or of the picture: Just. Inst., lib. 2, tit. 1, secs. 23, 24. Neither Bracton nor Blackstone has pointed out any difference except in the case of confusion of goods between the common law and the Roman, from which on this subject our law has mainly derived its principles.

So long as property wrongfully taken retains its original form and substance, or may be reduced to its original materials, it belongs, according to the admitted principles of the common law, to the original owner, without reference to the degree of improvement, or the additional value given to it by the labor of the wrong-doer. Nay, more: this rule holds good against an innocent purchaser from the wrong-doer, although its value be increased a hundred fold by the labor of the purchaser. This is a necessary consequence of the continuance of the original ownership.

There is no satisfactory reason why the wrongful conversion of the original materials into an article of a different name or a different species should work a transfer of the title from the true owner to the trespasser, provided the real identity of the thing can be traced by evidence. The difficulty of proving the identity is not a good reason. It relates merely to the

convenience of the remedy, and not at all to the right. There is no more difficulty or uncertainty in proving that the whisky in question was made of Wood's corn, than there would have been in proving that the plaintiff had made a cup of his gold, or a tool of his iron; and yet in those instances, according to the English cases, the proof would have been unobjectionable. In all cases where the new product cannot be identified by mere inspection, the original material must be traced by the testimony of witnesses from hand to hand through the process of transformation.

Again: the court below seem to have rejected the rule of the civil law applicable to this case, and to have adopted a principle not heretofore known to the common law; and for the reason that the rule of the civil law was too rigorous upon the wrong-doer, in depriving him of the benefit of his labor bestowed upon the goods wrongfully taken. But we think the civil law in this respect is in conformity not only with plain principles of morality, but supported by cogent reasons of public policy; while the rule adopted by the court below leads to the absurdity of treating the willful trespasser with greater kindness and mercy than it shows to the innocent possessor of another man's goods. A single example may suffice to prove this to be so. A trespasser takes a quantity of iron ore belonging to another and converts it into iron, thus changing the species and identity of the article: the owner of the ore may recover its value, in trover or trespass; but not the value of the iron, because under the rule of the court below it would be unjust and rigorous to deprive the trespasser of the value of his labor in the transmutation. But if the same trespasser steals the iron and sells it to an innocent purchaser, who works it into cutlery, the owner of the iron may recover of the purchaser the value of the cutlery, because by this process the original material is not destroyed, but remains, and may be reduced to its former state; and according to the rule adopted by the court below as to the change of identity the original ownership remains. Thus the innocent purchaser is deprived of the value of his labor, while the guilty trespasser is not.

The rule adopted by the court below seems, therefore, to be objectionable, because it operates unequally and unjustly. It not only divests the true owner of his title, without his consent; but it obliterates the distinction maintained by the civil law, and as we think by the common law, between the guilty and the innocent; and abolishes a salutary check against violence and fraud upon the rights of property.

We think, moreover, that the law on this subject has been settled by judicial decisions in this country. In *Betts v. Lee*, 5 Johns. 349 [4 Am. Dec. 368], it was decided that as against a trespasser, the original owner of the property may seize it in its new shape, whatever alteration of form it may have undergone, if he can prove the identity of the original materials. That was a case in which the defendant had cut down the plaintiff's trees and made them into shingles. The property could neither be identified by inspection nor restored to its original form; but the plaintiff recovered the value of the shingles. So in *Curtis v. Groat*, 6 Id. 169 [5 Am. Dec. 204], a trespasser cut wood on another's land and converted it into charcoal. It was held that the charcoal still belonged to the owner of the wood. Here was a change of the wood into an article of different kind and species. No part of the substance of the wood remained in its original state; its identity could not be ascertained by the senses, nor could it be restored to what it originally was. That case distinctly recognizes the principle that a willful trespasser cannot acquire a title to property merely by changing it from one species to another. And the late Chancellor Kent, in his Commentaries, vol. 2, p. 363, declares that the English law will not allow one man to gain a title to the property of another upon the principle of accession, if he took the other's property willfully as a trespasser; and that it was settled as early as the time of the Year Books, that whatever alteration of form any property had undergone, the owner might seize it in its new shape, if he could prove the identity of the original materials.

The same rule has been adopted in Pennsylvania: *Snyder v. Vaux*, 2 Rawle, 427 [21 Am. Dec. 460]. And in Maine and Massachusetts it has been applied to a willful intermixture of goods: *Ryder v. Hathaway*, 21 Pick. 304, 305; *Wingate v. Smith*, 20 Me. 287; *Willard v. Rice*, 11 Met. 493 [45 Am. Dec. 226].

We are therefore of opinion that if the plaintiffs below, in converting the corn into whisky, knew that it belonged to Wood, and that they were thus using it in violation of his right, they acquired no title to the manufactured article, which, although changed from the original material into another of different nature, yet being the actual product of the corn, still belonged to Wood. The evidence offered by the defendants and rejected by the circuit judge ought to have been admitted.

The right of Wood's creditors to seize the whisky by their execution is a necessary consequence of Wood's ownership.

Their right is paramount to his, and, of course, to his election to sue in trover or trespass for the corn.

The judgment of the supreme court should be reversed, and a new trial ordered.

Judgment reversed.

GARDINER, JEWETT, HURLBUT, and PRATT, JJ., concurred.

BRONSON, C. J., delivered a dissenting opinion.

TAYLOR, J., did not hear the argument, and gave no opinion.

WHETHER WRONG-DOER TAKING PROPERTY AND CHANGING FORM ACQUIRES TITLE, see *Silsbury v. McCoon*, 41 Am. Dec. 753, and note referring to prior cases and notes in this series; see also *Cross v. Marston*, 44 Id. 353. See, as to confusion of goods by a wrong-doer, *Sims v. Glasener*, 48 Id. 120; *Hall v. Page*, Id. 235; *Hesseltine v. Stockwell*, 50 Id. 627. That a willful trespasser thus taking another's property and changing its form, as by converting corn into whisky, wheat into flour, or the like, acquires no title, but that the new article belongs to the original owner, is a point to which the principal case is cited in *Wilson v. Nason*, 4 Bosw. 167; *Benedict v. National Bank of Commonwealth*, 4 Daly, 177; *Barry v. Brune*, 8 Hun, 399; *Newton v. Porter*, 5 Lana. 425; S. C. in the court of appeal, 69 N. Y. 137; *Wetherbee v. Green*, 22 Mich. 319. And in an action by the true owner against the wrong-doer, for the taking and conversion, the latter is liable for the enhanced value of the article in its new form without any deduction for the labor and expense bestowed upon it: *Rice v. Hollenbeck*, 19 Barb. 664; *Joslin v. Cowee*, 60 Id. 55; *Spicer v. Waters*, 65 Id. 234; *Firmin v. Firmin*, 9 Hun, 572; *Guckenheimer v. Angwine*, 81 N. Y. 397. See on that point the note to *Baker v. Wheeler*, 24 Am. Dec. 70. So generally, where expense has been bestowed by a wrong-doer upon another's property without changing its form, as by paying freight on it, or the like, he is entitled to no deduction therefor: *Kinsey v. Leggett*, 71 N. Y. 395. So in case of a confusion of goods by a wrong-doer, the rule of damages is the utmost value the article will bear: *Starr v. Winegar*, 3 Hun, 494; S. C., 6 Thomp. & C. 36. In all these cases *Silsbury v. McCoon* is referred to with approval. It is cited also in *Scattergood v. Wood*, 14 Hun, 273, to the point that a wrong-doer may be held liable in damages for taking another's property, for consequences quite remote from the original act. In *Rockwell v. Saunders*, 19 Barb. 483, the case is referred to as correctly laying down the distinction between a willful wrong-doer and a *bona fide* purchaser from him as to their respective liability where one's goods are taken and changed into a new form. In *Wetherbee v. Green*, 22 Mich. 315, also, the language of Ruggles, J., in the principal case, to the effect that where a chattel, wrongfully taken, comes into the hands of an innocent holder who changes it into a thing of a different species, the owner cannot reclaim it, is quoted with approval. In *Clement v. Duffy*, 54 Iowa, 635, it is also held, citing *Silsbury v. McCoon*, that the doctrine that one bestowing labor upon another's property, as by taking his grain and thrashing it, is not entitled to compensation for his labor in an action for the taking, should be limited to willful wrong-doers. Even though one is not a willful trespasser, he acquires no property in another's goods by changing their form where the change is not sufficient to destroy their identity, as where trees are felled and made into logs: *Firmin v. Firmin*, 9 Hun, 572. But where part of the materials of a

vessel are built into a new vessel, the owner of the materials acquires no interest in the vessel: *Andrew v. New Jersey Steamboat Co.*, 11 Id. 490, 492, referring to the principal case as not sanctioning the claim of the owner of the materials to a share in the new vessel.

ROCHESTER WHITE LEAD CO. v. CITY OF ROCHESTER.

[3 NEW YORK (3 CONSTOCK), 468.]

MUNICIPAL CORPORATIONS ARE HOLDEN FOR EXERCISE OF DUE CARE and skill by officers, agents, and servants employed in the construction of public works authorized or undertaken in the exercise of corporate powers, and are liable in damages for the natural consequences of unskillfulness or negligence of such employees.

CITY IS LIABLE FOR FLOODING LOT BY IMPROPER CONSTRUCTION OF CULVERT, and by not making it large enough, where it authorizes the construction of such culvert for the purpose of carrying away surface water.

PUBLIC OFFICERS, OR BODIES WHOSE DUTIES ARE JUDICIAL, ARE NOT LIABLE civilly for misconduct in their performance; otherwise where they violate a ministerial duty, even though their chief functions are judicial.

APPEAL from a judgment for plaintiffs in trespass on the case. The plaintiffs were owners of a factory in the city of Rochester, near which ran a small natural stream. The common council directed that the grade of a street crossed by this stream should be raised, and that a culvert should be built to carry the water. The work was done, and the culvert was sufficient for the ordinary flow; but an unusual flood occurred, for which it was not adequate, and the water was set back upon plaintiffs' premises, doing damage, for which this action was brought. It appeared that the city surveyor had advised the construction of the culvert in the manner adopted, and that it was even larger than he had directed; but that he was not a professional engineer, and that skillful engineers would have planned it on a larger scale, in anticipation of possible floods. The referees to whom the issue was sent for trial reported in favor of the plaintiffs, and the city moved to set aside the report. The supreme court denied the motion, holding, in an opinion not reported, that a city is liable for damage caused by the construction of new works as well as for that resulting from the repair of old, when it is not the necessary consequence of a municipal work lawfully undertaken, but is attributable to unskillfulness of officers or agents in their performance of the ministerial acts incident to the construction of the work. The plaintiff therefore had judgment.

Nicholas Hill, jun., for the appellants, the city.

E. Darwin Smith, for the respondents, the owners of the damaged land.

By Court, TAYLOR, J. A preliminary question is, whether all reasonable precaution against possible or contingent injuries was taken; and whether the culvert was built in a manner so skillful as to shield the corporation of Rochester from the charge of malfeasance in the execution of their duty. In the construction of a work like this, they were bound to exercise that care and prudence which a discreet and cautious individual would or ought to use, if the whole loss or risk were to be his alone. The counsel for the city contends that as it was larger than the city surveyor thought necessary, there could no blame attach to the city authorities. The city had seen fit to select for the responsible duty of adviser in these important matters a man who laid no claim to the skill of a professional engineer. He was their agent; and it will not answer for an individual or a corporation to select an incompetent agent, and then shield themselves from the consequences of his injudicious acts by justifying under his advice. No careful and prudent man would employ an agent to direct so important a work destitute alike of education and skill in his particular department of professional science. It seems from the testimony that a skillful engineer would have so directed the construction of the culvert as to have prevented the injury to the plaintiffs, for which they prosecute this suit. I have no doubt of the insufficiency of this ground of defense: *Bailey v. Mayor of N. Y.*, 3 Hill (N. Y.), 531 [38 Am. Dec. 669].

The principal question is, whether the corporation of a city are exempt, in consequence of any immunity inherent in their municipal character, from those liabilities for malfeasance for which individuals and other corporations would be liable in a civil action by the party injured.

A good deal of obscurity has, in times past, rested upon this subject, arising from the incident that some duties of such corporations are judicial in their nature, while others purely ministerial have to be executed by them; and these duties sometimes so mingle as not to be easily distinguished from each other. Wherever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility, by action, for the motives which influence him, and the manner in which such duties are performed. If corrupt, he may be im-

peached or indicted; but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done.

But this judicial immunity can be extended no further. The civil remedy depends exclusively upon the nature of the duty which has been violated. When duties which are purely ministerial are cast upon officers whose chief functions are judicial, and the ministerial duty is violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct: *Wilson v. Mayor of New York*, 1 Denio, 599 [43 Am. Dec. 719].

The charter of the city of Rochester confers upon the common council "power to cause common sewers, drains, vaults, and bridges to be made in any part of the city." The ordinance of the common council directing such public improvements is judicial in its nature, and extends immunity from private action for damages to those who perform the duty. But there this immunity ends. The further prosecution of the work is purely of a ministerial character; the agents to perform it are of their own selection, and they are bound to see that it is done in a safe and skillful manner.

On the argument, the counsel for the appellants cited *Steele v. Western Inland Lock Nav. Co.*, 2 Johns. 286. This was an action not against a municipal corporation, but against the Western Inland Lock Navigation Company. It was decided that as damages had already been awarded and compensation made to the plaintiff in the first instance, for running the canal through his land, no cause of action existed on that ground. The other point decided was that the law necessarily imposes on the company the duty of keeping this canal in repair; and in all such cases, where an injury has been sustained by the want of due care and caution of another, such person must be responsible for the damage occasioned by his neglect and omission. In *Martin v. Mayor etc. of Brooklyn*, 1 Hill (N. Y.), 545, the decision is placed by the judge upon the ground that the act complained of was judicial, and not ministerial. In the course of his opinion, Cowen, J., says: "I speak not of private corporations, nor of turnpike companies, who are certainly liable for their agents' omissions to keep their road in repair. I concede the liability also of municipal corporations for like omissions, where the duty of repair, or the like, is absolute, and due from them as a corporation: *Mayor of Lynn v. Turner*, 1 Cowp. 86."

In the case of *Bailey v. Mayor etc. of New York*, 3 Hill (N.Y.),

531 [38 Am. Dec. 669], the principal ground taken at the circuit, and upon which the cause is supposed to have turned there, was that the defendants were not chargeable for negligence or unskillfulness in the construction of the dam, inasmuch as the water commissioners were not appointed by them, nor subject to their direction or control. In other words, the commissioners not being their agents in the construction of the dam, the rule *respondeat superior* could not properly be applied. But Nelson, C. J., says: "If a public officer be guilty of negligence in the discharge of duties to be performed by himself, he will be held responsible." "Municipal corporations, in their private character as owners and occupiers of lands and houses, are regarded in the same light as individual owners and occupiers, and are dealt with accordingly." As such, they are bound to repair bridges and highways, and to the discharge of any other duty or obligation to which an individual owner would be subject: *Bailey v. Mayor etc. of New York, supra*, and authorities there referred to. In the same case in the court of errors, 2 Denio, 433, the chancellor remarks that "although it was once doubted whether an action of trespass, or trover, or an action on the case for malfeasance would lie against a corporation, it is now settled in England as well as in this state that such an action may be maintained. It is well settled that a municipal corporation may be made liable *civiliter* in certain cases, like any other corporation or associate person, though it is created mainly for the purpose of local government, and is for that purpose intrusted with some of the ordinary attributes of sovereignty."

In the case of *Mayor etc. of New York v. Furze*, 8 Hill (N. Y.), 612, Nelson, C. J., says: "The sewers in question were constructed by the corporation under the power conferred by the section of the statute [substantially the same as that in the charter of Rochester] already mentioned. If, therefore, we concede that the exercise of the power was in the first instance optional on the part of the corporation, yet having elected to act under it, they must be held responsible for a complete and perfect execution." "It would be highly unjust to allow, that after constructing these works the corporation might refuse to keep them in repair, and thus leave the street on which they have been placed in a worse condition than before they were put there. The owners and occupants of houses and lots in the neighborhood, having been charged with the expense of the sewers, acquired a right to the common use

of them; and a corresponding duty devolved upon the corporation to keep them in proper condition and repair."

By parity of reason, the corporation having undertaken to build sewers, in pursuance of the power conferred by the charter, they were bound to exercise such skill in the construction, and to give such sufficiency of capacity to the drain, as that it should not become a nuisance to the property of those persons who resided in the neighborhood. Or, in other words, having elected to act under the power granted by charter, they must be held responsible for a complete and perfect execution: See *Henly v. Mayor etc. of Lyme Regis*, 5 Bing. 91. In principle, there can be no possible difference. It is the duty of a municipal corporation to build a sewer so that it shall not become a nuisance to the neighborhood, as much as it is to avoid the same result by keeping it in repair after it has been built: *People v. Corporation of Albany*, 11 Wend. 543 [27 Am. Dec. 95]. I have not deemed it necessary to rely upon the cases in point decided in the supreme court of Ohio. In *McCombs v. Town Council of Akron*, 15 Ohio, 476 (and see cases there cited), the court hold that a municipal corporation can be held liable for an injury resulting to the property of another by an act of such corporation, strictly within the scope of its corporate authority, and unattended by any circumstance of negligence or malice. It is not necessary to take that extreme ground in the decision of the case before us. The doctrines heretofore held by eminent judges in our own courts are sufficient, and we must affirm the judgment of the court below.

Judgment affirmed.

LIABILITY OF MUNICIPAL CORPORATION FOR NEGLIGENCE OR UNSKILLFULNESS OF AGENTS in the performance of a work authorized by law, etc.: See *Hickox v. Cleveland*, 32 Am. Dec. 730; *Bailey v. Mayor of New York*, 38 Id. 669; *Ross v. Madison*, 48 Id. 361; *Commissioners v. Wood*, 49 Id. 582; *Meares v. Commissioners*, Id. 412, and notes. As to the liability of such a corporation for injuries from grading streets or changing the grade thereof, see *Mayor of Philadelphia v. Randolph*, 39 Id. 102; *Wilson v. Mayor etc. of New York*, 43 Id. 719; *Meares v. Commissioners*, 49 Id. 412; *Akron v. McComb*, 51 Id. 453, and notes. As to liability for neglect to construct proper sewers and drains, see *Wilson v. Mayor etc. of New York*, 43 Id. 719, and note. That a municipal corporation undertaking to perform a work authorized by law, such as the construction of a sewer, the grading of a street, or the like, acts ministerially in the performance of such work, and is bound to exercise the care and prudence of a discreet and cautious man to prevent injuries to others, and is therefore liable for damage occasioned by the negligence, unskillfulness, or improper conduct of its agents and servants in doing the work, is a doctrine for which the principal case is frequently recognized as a leading authority in New York and elsewhere: *Barton v. Syracuse*, 37

Barb. 296; S. C. in court of appeals, 36 N. Y. 55; *Kavanagh v. Brooklyn*, 38 Barb. 237; *Clark v. Miller*, 47 Id. 40; *Lacom v. Mayor etc. of New York*, 3 Duer, 414; *Bastable v. Syracuse*, 8 Hun, 587, 593; *Radcliff's Ex'rs v. Mayor etc. of Brooklyn*, 4 N. Y. 200, *post*, p. 357; *Hutson v. Mayor etc. of New York*, 5 Sandf. 103; S. C. in court of appeals, 9 N. Y. 169; *Mills v. Brooklyn*, 32 Id. 499; *Buffalo etc. T. Co. v. Buffalo*, 1 Thomp. & C. 540; *Nims v. Mayor etc. of New York*, 3 Id. 7; S. C. affirmed, 59 N. Y. 508; *Nevins v. Peoria*, 41 Ill. 512, 513; *Gillison v. Charleston*, 16 W. Va. 296; *Emery v. Lowell*, 104 Mass. 16. Therefore, where a city sewer is so imperfectly constructed that it bursts and floods adjacent premises, the city is liable: *Leventhal v. Mayor etc. of New York*, 5 Lans. 535; S. C., 61 Barb. 520; so where the sewer has not a sufficient outlet, by reason of which the water is backed up on the plaintiff's lot: *Donohue v. Mayor etc. of New York*, 3 Daly, 65, 67; so, where the sewer is so negligently and unskillfully constructed as to flood the plaintiff's ferry-slip: *Sleight v. Kingston*, 11 Hun, 597; so where in grading a street a large body of surface water is unnecessarily and improvidently cast on the plaintiff's land: *Bastable v. Syracuse*, 8 Hun, 587; *Gillison v. Charleston*, 16 W. Va. 296. And a city having constructed a street or sidewalk, is under obligation to keep it in repair, and is equally liable for injuries from neglect to repair as for injuries from negligence in construction: *Wendell v. Mayor etc. of Troy*, 39 Barb. 335; *Davenport v. Ruckman*, 10 Bosw. 28; S. C., 16 Abb. Pr. 43; *Wallace v. Mayor etc. of New York*, 2 Hilt. 450; S. C., 18 How. Pr. 174; S. C., 9 Abb. Pr. 43; *Hutson v. Mayor etc. of New York*, 9 N. Y. 169; *Clemence v. Auburn*, 66 Id. 341. But in *Peck v. Batavia*, 32 Barb. 637, it is held that a village is not liable for an injury from non-repair of a sidewalk where the law does not make it its absolute duty to keep the sidewalks in repair. And where the trustees of a village were by statute made highway commissioners for the village, which was created a separate road district, it was held that the village was not liable for an injury from their neglect of duty as such commissioners, because that was an independent and distinct duty imposed upon them: *Hickok v. Plattsburgh*, 15 Barb. 442. This decision was reversed, however, in the court of appeals, and the village was held liable: See *Conrad v. Ithaca*, 16 N. Y. 161, and note. The decision of the court of appeals was approved and followed in a similar case in *Hyatt v. Rondout*, 44 Barb. 393. Where the servants of a municipal corporation impound an animal in the exercise of a lawful authority, in an inclosure which is not high enough, and tie it improperly so that it is injured without the owner's fault, a complaint showing these facts states a good cause of action against the corporation: *Greencastle v. Martin*, 74 Ind. 453.

The gist of liability in all cases of this sort is negligence: *Congreve v. Morgan*, 4 Duer, 446; *Bellinger v. New York Cent. R. R. Co.*, 23 N. Y. 49. Hence, where there is no evidence of negligence or of unskillfulness (which is negligence), a municipal corporation cannot be held liable. Thus where the plaintiff was injured by the breaking of a plank on a city pier, and there was no proof that the plank was decayed or otherwise defective, and that the corporation through its officers had notice thereof, the city was held not to be liable: *Garrison v. Mayor etc. of New York*, 5 Bosw. 503.

Where a municipal corporation neglects a duty which is judicial or discretionary in its nature, no action will lie for an injury resulting therefrom, as for a neglect to provide sufficient sewers and drains: *Wilson v. Mayor etc. of New York*, 43 Am. Dec. 719, and note; *Mills v. Brooklyn*, 32 N. Y. 497; or for a neglect to enact an ordinance as authorized by the charter providing for the repair of sidewalks at the expense of adjacent property holders who neglect

to repair: *Cole v. Medina*, 27 Barb. 221, distinguishing the principal case. Nor is the corporation liable for an injury from an error of judgment in establishing the grade of a street: *Clemence v. Auburn*, 4 Hun, 388. In *Lloyd v. Mayor etc. of New York*, 5 N. Y. 374, the principal case is cited as recognizing and establishing the correct distinction between the governmental powers of a municipal corporation and its private powers as a "corporate legal individual."

CORPORATIONS NOT MUNICIPAL, AND INDIVIDUALS, ARE ALSO LIABLE for injuries resulting from the negligent or unskillful performance of a work authorized by law: *Brown v. Cayuga etc. R. R. Co.*, 12 N. Y. 492; *McCafferty v. Spuyten Duyvil etc. R. R. Co.*, 61 Id. 200; *Seabrook v. Hicker*, 2 Robt. 306. But there must be proof of negligence or unskillfulness causing the injury: *Bellinger v. New York Cent. R. R.*, 23 N. Y. 49; *Congreve v. Morgan*, 4 Duer, 446.

LIABILITY OF PUBLIC OFFICERS FOR MISCONDUCT WHERE DUTIES ARE JUDICIAL OR MINISTERIAL: See *Stone v. Graves*, 40 Am. Dec. 131; *Conwell v. Voorhees*, 42 Id. 206; *Wilson v. Mayor etc. of New York*, 43 Id. 719; *Teall v. Felton*, 49 Id. 352; *Stewart v. Southard*, Id. 463, and notes. That a public officer whose duties are judicial in their nature is not liable to a civil action for corrupt motives, error of judgment, negligence, or other misconduct, so long as he acts within his jurisdiction, is a point to which the principal case is cited in *Wade v. Matheson*, 4 Lana. 162; *Lange v. Benedict*, 8 Hun, 366; *Foster v. Van Wyck*, 2 Abb. App. Dec. 172; S. C., 4 Abb. Pr., N. S., 475; S. C., 41 How. Pr. 497; *People v. Supervisors of Chenango*, 11 N. Y. 573; *Barhyte v. Shepherd*, 35 Id. 247; *Gillison v. Charleston*, 16 W. Va. 296; otherwise, where his duties are ministerial, although he may have a discretion as to the method of performance: *Hicks v. Dorn*, 1 Lana. 87; S. C., 54 Barb. 178; S. C. in court of appeals, 42 N. Y. 53; 9 Abb. Pr., N. S., 55; *Barhyte v. Shepherd*, 35 N. Y. 247; *Gillison v. Charleston*, 16 W. Va. 296.

LEAVITT v. PUTNAM.

[8 NEW YORK (8 COMSTOCK), 494.]

DISHONORED NEGOTIABLE NOTE REMAINS NEGOTIABLE, AND SUBSEQUENT INDORSEMENT HAS SAME EFFECT as an indorsement before due, except that a demand must be made in a reasonable time to charge the indorser. INDORSEMENT OF OVERDUE NEGOTIABLE NOTE OMITTING WORDS "OR ORDER" nevertheless makes it payable to the indorser's order, and his indorsee may sue him thereon.

ERROR to review a judgment of the New York superior court in favor of indorsers. On the trial, the judge directed a nonsuit on the ground that the indorsement of the note, on which the plaintiff, who sued as president of the American Exchange Bank, relied, as vesting title to the note in the bank, having been made after the maturity of the note, did not entitle the holder to sue. The general term sustained this ruling.

James W. Gerard, for the plaintiff in error, the bank.

Samuel Sherwood, for the defendants in error, the indorsers.

By Court, HURLBUT, J. On the twenty-ninth day of August, 1844, Messrs. J. W. & R. Leavitt made their note for one thousand five hundred and seventy dollars and fifty-two cents, payable to the order of T. Putnam & Co. (the defendants) eight months after date. A few days after the maturity of the note, the defendants indorsed it as follows: "Pay the within to A. Thacher, value received, May 21, 1845. T. Putnam & Co." Thacher indorsed without recourse, and delivered the note for a valuable consideration to the American Exchange Bank, in whose behalf this action is brought.

On the trial, the defendants urged, among other grounds of objection to the plaintiff's recovery, that the defendants' indorsement was in effect a new draft payable to Thacher only, and not negotiable, so that no action could be maintained upon it in the name of the plaintiff. In this they were sustained by the court, and the plaintiff was nonsuited.

The other objections taken by the defendants on their motion for a nonsuit were not considered by the court below, and under the circumstances of the case cannot be noticed on this appeal; so that the only thing for us to consider is, whether the indorsement of a note made after due differs from one made before maturity in respect to its negotiability. It was conceded on the argument that no express authority could be found sustaining the distinction upon which the decision of the superior court was based, but it was urged that the defense could be sustained upon the principle that a dishonored note loses its mercantile character, and its indorsement becomes an original contract which must be made expressly negotiable in terms, or it could not be held to possess the character of negotiability. There is unquestionably a difference between the indorsement of a note after due and one while it is running to maturity, but this relates only to a single point arising from the necessity of the case, to wit, the time of payment, which, in the latter indorsement, is fixed at a future day by the express agreement of the parties, while in the former, it is declared by law to be within a reasonable time, upon demand. But in all other respects the contract is the same as an indorsement in the usual course of trade; and it is difficult to perceive how the single difference referred to can at all affect the negotiability of the indorsement.

A bill or note does not lose its negotiable character by being dishonored. If originally negotiable, it may still pass from hand to hand *ad infinitum* until paid by the drawer. Moreover, the indorser after maturity writes in the same form and is

bound only upon the same condition of demand upon the drawer and notice of non-payment as any other indorser. Thus the paper preserves its mercantile existence and retains the main attributes of a proper bill or note, and circulates as such in the commercial community. Exceptions to a general rule affecting so important and numerous a class of transactions as the one under consideration must be productive of great inconvenience, and will not be indulged except for urgent reasons; and nothing has been made to appear in the argument or seems to exist in the case, which warrants the court in treating the ordinary indorsement of a dishonored bill or note as without the law merchant and not negotiable. While it was questioned whether such a note was negotiable, and whether the indorser was chargeable except upon the usual condition of demand and notice, there was perhaps reason enough to sustain the decision of the court below. But since both the note and its indorsement, by a long course of decisions, have been treated as within the law merchant in respect to their main attributes, the indorsement ought to be regarded as negotiable to the same extent as an indorsement before maturity. The latter follows the nature of the original bill and is equally negotiable: *Edie v. East India Company*, 2 Burr. 1216; *Mutford v. Walcot*, 1 Ld. Raym. 574; *Allwood v. Haseldon*, 2 Bailey, 457; *Bishop v. Dexter*, 2 Conn. 419; *Berry v. Robinson*, 9 Johns. 121 [6 Am. Dec. 267].

The note in the present case was upon its face transferable, and its character in respect to negotiability could only have been changed by an indorsement containing express words of restriction. The defendants' indorsement was a full one, containing the name of the person in whose favor it was made, but omitting the words "or order," the legal effect of which was, nevertheless, to make the note payable to him or his order, and his indorsement therefore was effectual to transfer the note to the plaintiff: Ch. Bills, 136; Story on Prom. Notes, sec. 139.

I am of opinion that the judgment of the superior court should be reversed, and a new trial awarded.

Judgment reversed.

OVERDUE NOTE CONTINUES NEGOTIABLE: *Anan v. Houck*, 45 Am. Dec. 133, and note. So held also in *Scott v. First National Bank*, 71 Ind. 448, quoting with approval the language of the principal case as to the distinction between an indorsement of a note not yet due and one overdue. Where an indorser of a note pays it after maturity and before judgment thereon, he may recover on it against the maker or put it again in circulation: *Kelsey v. Bradbury*, 12 N. Y. Leg. Obs. 223, also citing the principal case.

INDORSER OF OVERDUE NOTE IS NOT LIABLE WITHOUT DEMAND within a reasonable time upon the maker and due notice of dishonor: *Kirkpatrick v. McCullough*, 39 Am. Dec. 158; *Sanborn v. Southard*, 43 Id. 288; *Gray v. Bell*, 44 Id. 277, and notes. To the same effect are *St. John v. Roberts*, 6 Bosw. 599; S. C. in court of appeals, 31 N. Y. 442; *Eisenlord v. Dillenback*, 15 Hun, 25, citing the principal case.

OMISSION OF "OR ORDER" IN INDORSEMENT of a negotiable note does not impair its negotiability: *Rice v. Stearns*, 3 Am. Dec. 129; *Hodges v. Adams*, 46 Id. 181. So held, also, in *Delano v. Rawson*, 10 Bosw. 291, citing *Leavitt v. Putnam*.

EMBURY v. CONNER.

[3 NEW YORK (3 CONSTACK), 511.]

TAKING PRIVATE PROPERTY FOR PRIVATE USE IS NOT AUTHORIZED by the right of eminent domain.

MEANING OF TERMS "DUE PROCESS OF LAW," in section 7, article 7 of constitution of New York, discussed.

STATUTE AUTHORIZING TAKING OF PRIVATE PROPERTY BY CONSENT of the owner is valid, notwithstanding the use for which it is taken is private.

PARTY MAY RENOUNCE CONSTITUTIONAL PROVISION made for his benefit.

DEED OR WRITTEN DECLARATION OF CONSENT TO TAKING OF LAND is not necessary to effectuate a transfer of the title, by means of proceedings for acquiring it taken under a statute which does not require such deed or writing. The various papers used in the proceedings may be referred to as furnishing evidence of consent in fact.

LAND-OWNER IS ESTOPPED, BY ACCEPTING COMPENSATION FOR LAND TAKEN pursuant to a statute, from afterwards denying that he consented to the taking.

JUDGMENT OR DECREE OF COURT OF COMPETENT JURISDICTION IS FINAL as a general rule, not only as to the subject-matter actually determined, but also as to every other matter which the parties might have litigated and have had decided in the cause.

POWER OF NEW YORK SUPREME COURT IN PROCEEDINGS TO CONDEMN LANDS, under the statute, although judicial, is limited to determining the fitness of the persons named as commissioners, the regularity of their proceedings to select the lands required and to estimate the compensation, etc., and the fairness of their assessment; and does not extend to determining whether the title is transferred. Hence this question, when raised in any subsequent litigation, is not concluded by the orders appointing the commissioners and confirming their report.

APPEAL from a judgment of the New York superior court in favor of plaintiffs in ejectment. The land in dispute was the greater portion of a lot lying along the northerly side of Ann street in the city of New York, which was formerly the undisputed property of Daniel Aymar, and was by his heirs and executors, after his death, conveyed to Philip Embury, and was by Philip Embury, in 1821, conveyed to Peter Embury, Hannah Aymar, and Margaret Jacot. The conveyance to Philip

Embury was apparently made for the purpose of carrying into effect some devise in the will of Aymar. In 1828, the city authorities determined upon widening Ann street on the side bounded by the Aymar lot. Commissioners were appointed to conduct the necessary proceedings, and they ascertained that it would be necessary to take for the street a strip of this lot, which they described as the property of "devisees of Daniel Aymar," though before this date it had been conveyed to the plaintiffs, as already stated. The street-opening law for the city then in force, act of April 9, 1813, 2 Rev. Laws, 1813, p. 416, contained provisions authorizing the city, in cases where part of a lot might be needed for a street improvement, and the owners should consent, to acquire title to the whole. Peter Embury appeared before the commissioners on behalf of the "devisees of Daniel Aymar," and urged their taking the entire Aymar lot; he also objected to their valuation as too low. The commissioners thereupon reported, recommending that the city should take the entire lot, and also slightly increasing their valuation. Their report was duly confirmed. A draft for the amount awarded, drawn in favor of the "devisees of Daniel Aymar," was delivered to Peter Embury, Hannah Aymar, and the husband of Margaret Jacot, who signed receipts for it, and the city conveyed that portion of the lot which was not needed for widening the street, to the defendant, Conner. The plaintiffs subsequently brought this action, claiming that the act of 1813 was unconstitutional, and therefore the proceedings taken under it could not divest their title. The chief ground of defense was that the request made for the taking of the whole lot, and the payment and acceptance of the damages awarded, estopped the plaintiff from claiming the land. Upon the trial, a verdict was taken for plaintiffs, subject to opinion, and the general term directed judgment on the verdict: 2 Sandf. 98.

William Kent, for appellants, the city.

Edward Sandford, for respondents, the claimants of the land.

By Court, JEWETT, J. On the part of the defendants it is claimed that the facts show that the corporation of New York acquired the title to the premises in question, and legally conveyed them to James Conner, thereby showing an outstanding title adverse and paramount to that set up by the plaintiffs. On the other hand, it is contended that the corporation of New York did not, by said proceedings, acquire any title to the premises in question, on the ground that section 179 of the act

of April 9, 1818, entitled "An act to reduce the several laws relating particularly to the city of New York, into one act;" 2 R. L. 416, contains the only authority attempted to be conferred by law upon the commissioners of estimate and assessment to include parts of lots not required to be taken for widening or opening streets in their estimate and assessment, and to vest the title thereto in the corporation of the city of New York, in fee, and that this section of the statute is void, because the legislature assumed to confer a power to take the property of one, without his consent, and apply it to the use of another.

By that section it is enacted that it shall be lawful for the commissioners, so to be appointed by the court, for any of the purposes aforesaid, in all cases where part only of any lot or lots, parcel or parcels of land, or of any other tenements, hereditaments, or premises, shall be required for any of the aforesaid purposes, leaving a residue of such lot or lots, parcel or parcels of land, or other premises belonging to the same owner or owners, or parties in interest, to whom the said part thereof so required for such purpose shall belong, and they, the said commissioners, shall deem it expedient and proper so to do, to include and comprise in their said estimate and assessment the whole or any part of such said residue of such lot or lots, or parcel or parcels of land or other premises along with the part of the same so required for the said purpose of the said intended operation and improvement, in like manner as if the said residue, or the part thereof so to be included in the said estimate and assessment, was required for the purpose of making the said operation and improvement so to be made, and all the said part and residue of the said lot or lots, parcel or parcels of land or other premises so included in the said estimate and assessment, and not required for the purpose of making such said operation and improvement, shall, on the confirmation by the said court of the said report of the commissioners, or such further report as may be made in the premises, become and be vested in the said mayor, aldermen, and commonalty of the city of New York, and their successors, in fee-simple, who may appropriate the same, or any part thereof, to public uses, and shall and may sell and dispose of the residue thereof, or the whole in case of no appropriation of any part thereof for public uses; and in case of the sale of the same, or any part thereof, the proceeds shall be disposed of in the manner and for the purposes as provided for by the next section.

It needs no argument to show that the end and design of this section was not to take private property for the use of the public. It manifestly goes upon the ground that the property so authorized to be taken is not wanted for the purpose of forming or improving a street, the object in view for which the proceedings are instituted. In the *Matter of Albany Street*, 11 Wend. 148 [25 Am. Dec. 618], the constitutionality of this enactment came directly under the consideration of the supreme court, on application to confirm the report of the commissioners in that matter. The court then held that if that provision was intended merely to give to the corporation capacity to take property under such circumstances, with the consent of the owner, and then to dispose of it, there could be no objection to it. But if it was to be taken literally, that the commissioners might, against the consent of the owner, take the whole lot, when only a part was required for public use, and the residue to be applied to private use, it assumed a power which the legislature did not possess. This decision went mainly upon the implication contained in the last member of the clause of section 7 of article 7 of the constitution of 1821, that "no person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." Chief Justice Savage said: "The constitution, by authorizing the appropriation of private property to public use, impliedly declares, that for any other use, private property shall not be taken from one and applied to the private use of another." In *Bloodgood v. Mohawk and Hudson R. R. Co.*, 18 Wend. 59 [31 Am. Dec. 313], Mr. Senator Tracy said the words should be construed "as equivalent to a constitutional declaration that private property, without the consent of the owner, shall be taken only for the public use, and then only upon a just compensation." Bronson, J., in *Taylor v. Porter*, 4 Hill, 147 [40 Am. Dec. 274], in reference to this question, said, that although he felt no disposition to question the soundness of these views, yet that it seemed to him that the case stood stronger upon the first member of the clause, "No person shall be deprived of life, liberty, or property, without due process of law." That the words "due process of law" in that place could not mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property.

The same doctrine was held in the *Matter of John and Cherry*

Streets, 19 Wend. 659, and by the chancellor in *Varick v. Smith*, 5 Paige, 137 [28 Am. Dec. 417], and was admitted by all the members of the court for the correction of errors, whose opinions have been reported in the case referred to of *Bloodgood v. Mohawk and Hudson R. R. Co.*, *supra*.

I think these decisions should be regarded as having settled the point that a statute is unconstitutional and void which authorizes the transfer of one man's property to another without the consent of the owner, although compensation is made. The late Chancellor Kent, in reference to the decision in *Taylor v. Porter*, *supra*, says: "I apprehend that the decision of the court was founded on just principles, and that taking private property for private uses, without the consent of the owner, is an abuse of the right of eminent domain, and contrary to fundamental and constitutional doctrine in the English and American law: 2 Kent's Com., 5th ed., 340, note c.

But it is insisted that as the enactment is only held to be void on the ground that it takes private property for private uses against the owner's consent, if the consent be given, all objection on the ground of unconstitutionality is removed. The decisions to which I have referred proceed upon that principle; and Mr. Justice Bronson, in *Taylor v. Porter*, *supra*, in terms concedes that the objection has no application when the owner consents. If we read the statute in question with a proviso that the owner consent, and I think we should, that consent removes all obstacle, and lets the statute in to operate the same as if it had in terms contained the condition.

But it is said that even then the statute of frauds, 2 R. S. 134, sec. 6, creates an insuperable difficulty in the way of the defendants, on the ground that such consent, not being in writing, the title would still be void under it. But I think not. If the principles held in the case of *Baker v. Braman*, 6 Hill, 47 [40 Am. Dec. 387], are sound—and I think that they are—they may be properly applied in this case. It was there held that the owner's consent took away all objection to the statute in relation to private roads; although the road was an incorporeal hereditament, and could not therefore be granted even at common law without a deed, as it was competent for the legislature to create an exception both to the common-law rule and the statute of frauds; and that the legislature had done so by the statute then in question. The action in that case was brought to recover the damages assessed by a jury, for a private road, which the commissioners of highways had

laid out through the plaintiff's lands pursuant to 1 R. S. 517, secs. 77, 78. It was there held that a person might renounce a constitutional provision made for his benefit, and that if a private road be laid out pursuant to the statute, with the consent of the owner of the land, the proceeding was valid, and that such consent need not be in writing; that a parol consent was sufficient; and that the bringing of an action after the road was so laid out and his damages had been assessed, was a sufficient manifestation of consent, and an adoption of the machinery provided by the statute for effectuating the grant. *Lee v. Tillotson*, 24 Wend. 337 [35 Am. Dec. 624], and *People v. Murray*, 5 Hill, 472, are cases to show that a party may waive a constitutional as well as a statute provision made for his own benefit.

As it respects the evidence to show the consent of the owners of the premises in question, to the taking thereof by the commissioners, under section 179, we have in proof their report and additional report, in each of which that fact in substance is asserted. In the report it is as follows: "We have estimated and assessed the loss and damage to the said devisees of Daniel Aymar, from the said widening and improving of Ann street, by and in consequence of their relinquishing their interest in the last-described piece or parcel of land, which is required for that purpose, and also in the said residue so included and comprised as aforesaid, and in the buildings situated on said two pieces of land, to amount to the sum of eleven thousand two hundred and twenty dollars." This report was made and signed by the commissioners on the eighth day of July, 1829. And having deposited a copy thereof, and given the notice required by law for bringing in written objections, and that the same would be presented to the court for confirmation, the commissioners, on the thirty-first day of July, 1829, made an additional report, in which, after reciting the making of their report, the fact of depositing a copy thereof in the clerk's office and of giving said notice, they further reported that the objections, papers, and documents thereunto annexed, and none others, had been presented to them against their said assessment and estimate in the premises. That after the receipt thereof they reconsidered their estimate, etc., in the premises, and were of opinion that the same required correction, and that they did accordingly correct the same by increasing the said sum of eleven thousand two hundred and twenty dollars to eleven thousand three hundred and seventy dollars. These reports, pursuant to the notice, were presented

to the supreme court for confirmation, annexed to which were several affidavits showing the due publication of the notice, of the signing of the reports by the commissioners, the notice, the written objections of Peter Embury, bearing date the thirteenth day of July, 1829, and several affidavits showing the value of the premises taken by the commissioners, and an affidavit of J. Slidell, one of the commissioners, made on the first day of August, 1829, showing that when the commissioners first met in reference to the matter of widening and improving Ann street, Peter Embury appeared before them in behalf of the devisees of Daniel Aymar, and stated that as the house and lot were undivided among the heirs, it would be better for the commissioners to take the whole lot and not leave the gore of land remaining, which would belong, in undivided shares, to said heirs; that the commissioners endeavored to persuade Mr. Embury to retain the gore, but that he persisted, and the commissioners finally concluded that under all the circumstances it was expedient to include and comprise the whole lot in the assessment.

Upon the presentation of these papers, and after hearing counsel on both sides, the court confirmed the report of the commissioners. The authority to do so is contained in 2 R. L. 409, sec. 178, and declares that such report, when so confirmed by the said court, shall be final and conclusive upon all persons and parties whatsoever. Upon the confirmation being made, the papers on which the application was founded were filed, and became records of the court in that matter, and as such it was competent to read in evidence on the trial certified copies of any and each of them. The judge on the trial, therefore, erred in refusing to permit the reading in evidence on the trial, Embury's objections presented to the commissioners, and the affidavit of Slidell. I know of no principle that will shut out, as incompetent evidence on the trial, documents which were competent to be used and were used in the proceedings and on the application for confirmation before the supreme court, and were placed on the files and records of the court, as part of the proceedings, etc., in that matter. All the necessary or proper documents and papers used in summary proceedings in a matter pending before a court of record, although not proceeding according to the course of the common law, in that particular matter, unless otherwise declared by law, are competent as evidence in an action where the validity of such proceedings is questioned, and they become material to sustain the adjudication in such matter.

These papers, if they had been admitted in evidence, would have shown, satisfactorily, as I think, that Peter Embury at least consented and was desirous that the commissioners should take the premises in question under the authority conferred by section 179, believing that the interests of the owners would be thereby promoted; and if it be shown that he was authorized to represent Hannah Aymar, and David Jacot and Margaret, his wife, before the commissioners in that matter, it seems to me that it would be enough to show their consent also; especially, when connected with the fact that he, together with Hannah Aymar and David Jacot, subsequently received from the corporation the full amount of the estimated loss and damage (eleven thousand three hundred and seventy dollars), knowing that it included the whole estimated loss and damage for both pieces of land, which the commissioners took. It is quite as clear a manifestation of the consent of the three to the taking of the premises in question, by them, and an adoption of the statute machinery for effectuating the grant of that land, as the manifestation of the consent was held to be in *Baker v. Braman*, by bringing an action for the recovery of the damages assessed. These proceedings being taken with the consent of the owners and duly confirmed by the court, and the damages paid pursuant to the statute, operate as a conveyance of the land by the owner, and vest the title in the corporation: *Arnot v. McClure*, 4 Denio, 45.

Should it be objected that Margaret Jacot, being a *feme covert* at the time, was legally incompetent to give consent; the answer is, the legislature had power to remove that disability, and that it has done so, if we read the statute as containing the proviso or condition upon which the commissioners might take such lands, that the owners consent, without making any exception. The evidence in this case was not sufficient to show that Mrs. Jacot ever gave her consent; there is nothing, in fact, beyond the assertion in the reports of the commissioners that the owners relinquished, etc. There is no evidence that she authorized Peter Embury to represent her before the commissioners, or that she ever received any portion of the money awarded as the loss and damage sustained by the owners, by the taking of the premises in question. She owned the fee of the one-fifth part thereof subject to the life estate of David Jacot, her husband therein. It was as necessary to the transfer of her estate to the corporation,

that she should have consented, as it was that her husband should consent to effect a transfer of his interest therein.

But the defendants have made another point. It is insisted that the proceedings for widening Ann street by the corporation, and their confirmation, after discussion, by the judgment of the supreme court, are conclusive upon the plaintiffs, as an adjudication in respect to their title to the premises taken by the corporation under these proceedings, pursuant to the provisions of the statutes referred to, not having been reversed on *certiorari* or writ of error; and that they are estopped, by such proceedings and judgment, from claiming title to any portion of the said premises, upon the ground that the title to the premises has been adjudged to be in the corporation, the grantor of the defendants, by a court having jurisdiction to adjudicate in a proceeding between the corporation and the plaintiffs, in which the question as to which had or was entitled to the title to the premises, was directly put in issue and determined.

That the judgment or decree of a court possessing competent jurisdiction is, as a general rule, final, not only as to the subject-matter thereby actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided, can admit of no doubt: *Voorhees v. Bank of the United States*, 10 Pet. 449; *Le Guen v. Gouverneur*, 1 Johns. Cas. 436 [1 Am. Dec. 121]; 2d ed., note *a*, 492; 2 Smith's L. Cas., tit. Estoppel, 455, note; *Outram v. Morewood*, 3 East, 346; *Eschridge v. Osborn*, 12 Wend. 399; *Duchess of Kingston's Case*, 11 St. Tr. 261; 1 Phill. Ev. 223.

The general rule is, that an allegation on record, upon which issue has been once taken and found, and a judgment has been rendered, is, between the parties taking it and their privies, conclusive, according to the finding thereof, so as to estop the parties respectively from again litigating that fact once so tried and found, whether it is pleaded in bar, or given in evidence, when it is proper to be given in evidence: 2 Cowen & Hill's Notes to Phill. Ev. 804-810, 971; *Gardner v. Buckbee*, 3 Cow. 120 [15 Am. Dec. 256]; *Burt v. Sternburgh*, 4 Id. 559 [15 Am. Dec. 402]; *Wood v. Jackson*, 8 Wend. 1 [22 Am. Dec. 603]; *Young v. Black*, 7 Cranch, 565; *Wright v. Butler*, 6 Wend. 284 [21 Am. Dec. 323]; *Lawrence v. Hunt*, 10 Id. 80 [25 Am. Dec. 539]; *Eastman v. Cooper*, 15 Pick. 276 [26 Am. Dec. 600].

That the supreme court, under the provisions of the New York street law, exercises its powers as a court and not as commissioners appointed by the legislature, and that its decia-

ions in such matters are judgments of that court, and as such subject to review in the appellate court, must be regarded as settled: *Striker v. Kelly*, 7 Hill, 9; S. C. in error, 2 Denio, 323. But as its powers in such matters are wholly derived from the statutes, and do not belong to it as a court of general jurisdiction, its decisions must be treated like those of a court of special and limited jurisdiction: 2 Cowen & Hill's Notes, 946.

It is, however, of no consequence, in determining the question under consideration, to decide whether the supreme court, in such cases, is to be regarded as acting as a court of general or of limited jurisdiction. For a judgment, whether rendered by a court possessing one or the other jurisdiction, if acting within the scope of its lawful authority, duly observing all the prescribed modes of proceeding, is equally conclusive, not only against future litigation of the same matters, but in all other respects.

To determine the question involved by this point, it becomes necessary to see what matters are referred to the supreme court, in street cases under the laws, for its adjudication, and what are the issues between the parties, because, ordinarily, the parties or their privies are only concluded by a judgment of a court upon such matters as are in issue between them in the cause or proceeding referred to it for determination, and such as they might litigate in the cause and might have had decided.

Under these statutes, there is nothing submitted to the supreme court for its consideration but the appointment of the commissioners and the confirmation of their report, when presented. This involves only the question of the fitness of the persons named for the appointment as commissioners, and the regularity of the proceedings of the corporation and commissioners, and the justness of the estimate and assessment, made and reported by the commissioners. The question whether the statute (the proceedings being regular and a proper estimate and assessment having been made, reported, and a rule or order entered of confirmation by the court) has the legal effect to transfer to the corporation the legal title of the owner of the lands proposed to be taken for the purpose of opening, etc., or laying out, etc., or as a residue, etc., under sections 178 and 179, is not made, and cannot, from the nature of the case as presented for the consideration of the court, be determined. The corporation, when it takes these proceedings, assumes that when completed the title of the owner of the lands will be thereby transferred from the owner and become vested in the

corporation; but if questioned by the owner, it remains, as it seems to me, to be made whenever the corporation, or its grantee, undertakes to assert a right of possession to the premises so taken. Although the statute declares that "such report when so confirmed by the said court shall be final and conclusive, as well upon the mayor, aldermen, and commonalty of the city of New York, as upon the owners, lessees, persons, and parties interested in and entitled unto the lands, tenements, hereditaments, and premises mentioned in the said report; and also upon all other persons whomsoever; and on such final confirmation of such report by the said court, the said mayor, aldermen, and commonalty of the city of New York shall become and be seised in fee of all the said lands, tenements, hereditaments, and premises in the said report mentioned, that shall or may be so required, for the purpose of opening," etc., "and [as in section 179] all the said part and residue of the said lot or lots, etc., so included in the said estimate and assessment, and not required for the purpose of making such said operation and improvement, shall, on confirmation by the said court of the said report of the commissioners, or such further report as may be made in the premises, become and be vested in the said mayor, aldermen, and commonalty of the city of New York and their successors, in fee-simple;" yet it seems to me that if the corporation, in the one case, becomes seised, and in the other becomes vested in fee-simple of the lands mentioned, it is by force of the statute (its provisions being complied with), and not by the confirmation of the report of the commissioners by the court as an adjudication upon that question.

The whole proceeding is but a mode adopted by the state to exercise its right of eminent domain, though a power confided to the corporation of the city of New York or its officers. The confirmation of the proceedings taken under the statute in no sense can be deemed an adjudication upon the effect of these proceedings. The order of confirmation has the effect merely to conclude the parties in respect to the regularity of the proceedings taken preliminarily, in order to transfer the title of the owner of the lands proposed to be taken, to the corporation, and does not, as I have before remarked, conclude either party in respect to the question as to the effect. Whether the statute which provides for divesting the title of the owners of the premises in question, and transferring it to the corporation, is or not constitutional and valid, has not been, and could not properly have been, determined by the court, so as to estop the

owners from making the question in the action brought for the recovery of the possession of them.

The judgment of the superior court should be reversed, and a new trial had, costs to abide the event.

Ordered accordingly.

LEGISLATURE CANNOT AUTHORIZE TAKING OF PRIVATE PROPERTY FOR PRIVATE USE, or the transfer of one man's property to another without the owner's consent, though full compensation be made: *Beekman v. Saratoga etc. R. R. Co.*, 22 Am. Dec. 679; *Scudder v. Trenton Del. F. Co.*, 23 Id. 756; *Harding v. Goodlett*, 24 Id. 548; *Varick v. Smith*, 28 Id. 417; *Ten Eyck v. Delaware etc. Canal Co.*, 37 Id. 233; *Taylor v. Porter*, 40 Id. 274; *Baker v. Braman*, Id. 387; *Pearce's Heirs v. Patton*, 45 Id. 61, and cases cited in the notes thereto. To the same effect, citing the principal case and variously applying its doctrine, are *Newland v. Marsh*, 19 Ill. 385; *Cromie v. Wabash and Erie Canal*, 71 Ind. 224; *Pumpelly v. Oswego*, 45 How. Pr. 247; *People v. Kerr*, 27 N. Y. 198; *New York etc. R. R. Co. v. Van Horn*, 57 Id. 477; *In re Deansville Cemetery*, 66 Id. 571; *People v. Deyoe*, 2 Thomp. & C. 148. Nor can the taking of more land than is necessary for a public use be constitutionally authorized: *Cooper v. Williams*, 24 Am. Dec. 299. So held, citing the principal case, in *Heyward v. Mayor etc. of New York*, 7 N. Y. 323, where it is decided, however, that this principle does not prevent the legislature from authorizing the appropriation of the fee of land for a public use so that it will not revert when the use ceases.

OWNER MAY CONSENT TO TAKING OF HIS LAND FOR PRIVATE USE under a statute which without consent would be unconstitutional: *Baker v. Braman*, 40 Am. Dec. 387; and this consent may be by parol: Id; see also *Wellington's Case*, 26 Id. 631. And no one but the owner can raise the question that no consent was given: See the case last cited. That land may be taken under proceedings for condemnation either for a public or private use with the assent of the owner, so as to transfer the title as fully as by an actual conveyance, is a point to which the principal case is cited in *Sherman v. Kane*, 14 Jones & S. 320; *Trombley v. Humphrey*, 23 Mich. 476. And where a statute authorizes a condemnation of land for a use which is not strictly public, it may be construed to authorize a taking only with the consent of the owner for the purpose of upholding it, and validating an appropriation made under it with the owner's consent: *Heath v. Hubbell*, 6 Daly, 187. The owner's consent may be by parol: *Barstow v. Draper*, 5 Duer, 137. Or it may be implied from the owner's acceptance of the compensation tendered, or from other acts *in pais*, so as to estop him from subsequently objecting to the taking: *Sherman v. McKeon*, 8 Bosw. 111; S. C. in court of appeals, 38 N. Y. 275; *Vose v. Cockcroft*, 44 Id. 424; *Detmold v. Drake*, 46 Id. 325. So his assent to the estimate of his damages may be inferred from his failure to object to the commissioners' report: *Schuchardt v. Mayor etc. of New York*, 53 Id. 210. No one but the owner can raise the question of the constitutionality of the act under which the land is taken: *People v. Lawrence*, 41 Id. 140; *Detmold v. Drake*, *supra*. So no one but the owner can object that due compensation is not made where land is taken for a public use; and if he once assents, neither he nor any one claiming under him can afterwards raise the question: *Haskell v. New Bedford*, 108 Mass. 214.

PARTY MAY WAIVE STATUTORY OR CONSTITUTIONAL PROVISION IN HIS FAVOR: *Lee v. Tillotson*, 35 Am. Dec. 624; *Baker v. Braman*, 40 Id. 387, and cases cited in notes thereto. So held, citing the principal case, in *Fiero v.*

Reynolds, 20 Barb. 276; *Bucklin v. Chapin*, 53 Id. 493; S. C., 35 How. Pr. 161; *Lewis v. Utica*, 67 Barb. 458; *Keator v. Ulster etc. R. R. Co.*, 7 How. Pr. 43; *Requa v. Holmes*, 19 Id. 444; *Nason v. Ludington*, 55 Id. 344; *People v. Tweed*, 5 Hun, 391; *People v. Mckler*, 19 Id. 613; *Whitney v. Mayor etc. of New York*, 6 Abb. N. C. 342; *People v. Cancemi*, 7 Abb. Pr. 302; *People v. Williams*, 3 Thomp. & C. 341; *Conkling v. King*, 10 N. Y. 446; *Cancemi v. People*, 18 Id. 136; *Sherman v. McKeon*, 38 Id. 275; *Phyfe v. Eimer*, 45 Id. 104; *Isham v. Buckingham*, 49 Id. 222; *Gutchess v. Daniels*, Id. 608; *Anderson v. Reilly*, 66 Id. 192; *Baird v. Mayor etc. of New York*, 74 Id. 386; *Pierson v. People*, 79 Id. 429. So, where only civil or alienable rights are involved, and there are no opposing considerations of public policy: *Phyfe v. Eimer*, *supra*; *Anderson v. Reilly*, *supra*. Hence a party whose rights are affected by an unconstitutional statute may by his acts waive his right to contest its validity: *Moore v. New Orleans*, 32 La. Ann. 746; *McCarthy v. Levasche*, 89 Ill. 274; *People v. Williams*, *supra*, all citing the principal case.

CONSTITUTIONAL GUARANTY OF "DUE PROCESS OF LAW," meaning and effect of: See the note to *Bank of State v. Cooper*, 24 Am. Dec. 537. See also the note to *Flint River Steamboat Co. v. Foster*, 48 Id. 271, citing other cases. The principal case is cited with approval on this point in *Cohen v. Wright*, 22 Cal. 318; *Wynshamer v. People*, 13 N. Y. 416, 417; *Metropolitan Board of Health v. Heister*, 37 Id. 682; *People v. T'oyntee*, 2 Park. Cr. 538; S. C., 12 How. Pr. 269.

CONCLUSIVENESS OF JUDGMENT UPON PARTIES AND PRIVIES: See *Ponder v. Moseley*, 48 Am. Dec. 194; *Whitney v. Walsh*, Id. 590; *Agnew v. McElroy*, Id. 772; *Upson v. Horn*, 49 Id. 633; *Taylor v. Larkin*, Id. 119; *Voss v. Morton*, 50 Id. 750; *Alexander v. Walter*, Id. 688; *Candee v. Lord*, 51 Id. 294; *Witt v. Russey*, Id. 701; *Fitzhugh v. Custer*, Id. 728; *Jones v. Weatherbee*, Id. 653; *Lynch v. Baxter*, Id. 735, and other cases cited in the notes thereto. The doctrine of the principal case on this point is referred to with approval in many subsequent decisions in New York and other states: *Gray v. Gillilan*, 15 Ill. 457; *People v. Dawell*, 25 Mich. 271; *Dobson v. Pearce*, 1 Abb. Pr. 104; S. C., 12 N. Y. 167; *Freer v. Stotenbur*, 2 Abb. App. Dec. 196; S. C., 2 Keyes, 476; S. C., 34 How. Pr. 449; *Fake v. Smith*, 7 Abb. Pr., N. S., 110; *Baker v. Rand*, 13 Barb. 161; *Baldwin v. McArthur*, 17 Id. 420; *Hayes v. Reese*, 34 Id. 156; *Harris v. Harris*, 36 Id. 94; *Craig v. Ward*, Id. 383; *Glackin v. Zeller*, 52 Id. 151; *Reynolds v. Garner*, 66 Id. 313; *Derby v. Hartman*, 3 Daly, 461; *Demarest v. Doig*, 29 How. Pr. 275; S. C., 32 N. Y. 290; *Kamp v. Kamp*, 46 How. Pr. 145; *Tyng v. Clarke*, 9 Hun, 276, *per* Daniels, J., dissenting; *Haskin v. Mayor etc. of New York*, 11 Id. 437; *People v. Brennan*, 3 Id. 674; S. C., 6 Thomp. & C. 126; *Johnson v. Albany etc. R. R. Co.*, 5 Lana. 225; *O'Conner v. Bagley*, 3 E. D. Smith, 149; *White v. Coatsworth*, 6 N. Y. 139; *Clemens v. Clemens*, 37 Id. 74; *Kelsey v. Ward*, 38 Id. 83; *Krekeler v. Ritter*, 62 Id. 374; *Dunham v. Bower*, 77 Id. 79; *Christmas v. Russell*, 5 Wall. 307. That the decisions of courts of general jurisdiction exercising special statutory powers are to be treated like judgments of courts of limited jurisdiction, and want of jurisdiction may be shown by extrinsic evidence, is a point to which the case is cited in *Ferguson v. Crawford*, 70 N. Y. 260. The case is cited also in *Pullan v. Kinsinger*, 2 Abb. 98, to the point as to when the proof of jurisdictional facts may be presumed where the judgment of a special tribunal comes collaterally in question.

POWER OF COURT IN CASES AFFECTING ASSESSMENTS FOR STREET IMPROVEMENTS, ETC.—In *Morse v. Williamson*, 35 Barb. 477, the principal case is cited to the point that in street-assessment cases and the like, courts do not exer-

cise their ordinary jurisdiction, but act under a special statutory authority. In *Woodruff v. Fisher*, 17 Id. 232, it is said not to be important whether the court act as a court or as commissioners in such cases. That the court acts judicially in appointing commissioners to assess damages in such cases is held, citing *Embury v. Conner*, in *Chicago etc. R. R. Co. v. Chamberlain*, 84 Ill. 342. The supreme court of New York, on an application for the appointment of commissioners in a street-opening case, cannot review the action of the council as to the wisdom of opening the street: *In re Albany Street*, 6 Abb. Pr. 275. On appeal from an ordinance directing a local improvement, the only questions which can be considered are the jurisdiction of the council and the regularity of its proceedings: *In re Southworth*, 5 Hun, 56, all citing the principal case. It is cited also in *Broadway Widening*, 63 Barb. 576, to the point that it is doubtful whether irregularities in a street-widening case can be considered on a motion to confirm the report of the commissioners. As to what matters properly arise on such a motion, the case is cited in *Astor v. Mayor etc. of New York*, 5 Jones & S. 585.

BARTLEY v. RICHTMYER.

[4 NEW YORK (4 COMSTOCK), 88.]

ACTION FOR SEDUCTION IS FOUNDED ON LOSS OF SERVICES, real or supposed, and cannot be maintained in favor of a step-father for seduction of his step-daughter after she has left his family and service, even though she returned and was maintained by him during her confinement.

APPEAL from a judgment of the supreme court in favor of plaintiff in an action for seduction. The circumstances out of which the action arose are stated in the opinion. On the trial the chief ground of defense was that the plaintiff did not show a right to maintain the action, because he was neither parent nor employer. But the plaintiff recovered a verdict for one thousand dollars, and the supreme court refused to set it aside, holding, in an opinion not reported, that one who has received a fatherless girl into his family as an adopted daughter is entitled to an action for seduction on the same facts and to the same extent as would sustain one brought by her natural father if living.

Azor Taber, for the appellant, the alleged seducer.

Nicholas Hill, jun., for the respondent, the step-father.

By Court, BRONSON, C. J. The declaration is in case, for debauching Gitty Ellen McGarey, the plaintiff's step-daughter and servant, then under age, and getting her with child, whereby the plaintiff lost her services, and was put to the expenses of her lying-in. Actions of this kind are founded on the relation of master and servant; and the gist of the action, whether it be case or trespass, is the master's loss of services in conso-

quence of the wrong done by the defendant. The principle is the same as it is in an action for beating a servant, by means of which the master lost his services. In neither case does the act done to the servant give any right of action to the master, unless it results in an injury to him. For the beating itself, the servant may sue; and so she might for the debauching, if it were not for her consent. The principle is plain enough; but it has to some extent been lost sight of by the courts in their zeal to punish the defendant, and do something to heal the wounded feelings of others.

It is obvious from the nature of the case, that the master ought not, in point of principle, to recover anything more than a compensation for the pecuniary loss which he has sustained; and such was formerly the rule in this action, as it is still where the master sues for the battery of a servant: *Cowden v. Wright*, 24 Wend. 429 [35 Am. Dec. 633]; *Whitney v. Hitchcock*, 4 Denio, 461. But it was now settled that a father may recover exemplary damages for the seduction of his daughter; and very large, not to say outrageous, verdicts have become a part of the fashion of the times. And such verdicts have also been allowed in a few instances where the action was not brought by the father. But this error has not yet become so inveterate as to be beyond the reach of judicial correction. It had its beginning in the case of *Edmondson v. Machell*, 2 T. R. 4, which was not an action for seduction, but for beating the plaintiff's niece, *per quod servitium amisit*, and the aunt had a verdict for exemplary damages. This was clearly wrong, as appears from the cases already cited; and it is quite evident that the verdict would have been set aside, if the court had not, in its discretion, denied a new trial, on an undertaking by the plaintiff to pay over the damages to the niece, and an undertaking by the niece not to proceed in an action which she had brought for the same beating. This case has been considered an authority for allowing exemplary damages when the action is brought by one standing *in loco parentis*; but I think it proves the other way.

Since it has been settled that the value of the services actually lost does not constitute the measure of damages when the action is brought by the father, it has been held sufficient for him to show that the daughter was under age, and lived in his family at the time of the seduction, without proving that she had been accustomed to render services. It has been thought enough that the father was entitled to her services,

and might have required them if he had chosen to do so. The principle applies although the daughter may have been from home on a visit to a friend at the time of the seduction. And it has been extended to cases where the daughter was in the service of a third person at the time of the seduction, but under such circumstances that the father might have commanded her services at pleasure: *Mar'in v. Payne*, 9 Johns. 387 [6 Am. Dec. 288]; *Clark v. Fitch*, 2 Wend. 459 [20 Am. Dec. 639]; *Ingersoll v. Jones*, 5 Barb. 661; *Hornketh v. Barr*, 8 Serg. & R. 36 [11 Am. Dec. 568]. These cases go beyond the rule as it is administered in England: *Dean v. Peel*, 5 East, 45; *Blaymire v. Haley*, 6 Mee. & W. 55; *Harris v. Butler*, 2 Id. 589; *Grinnell v. Wells*, 7 Man. & G. 1033; S. C., 8 Scott N. R. 741. But it is not too much, perhaps, to infer the relation of master and servant, for the purposes of this action, wherever the father had not abandoned his daughter, and was legally entitled to her services at the time of the seduction.

When the daughter is of full age, the father is not entitled to her services; and he cannot maintain this action without showing that the relation of master and servant actually existed at the time of the injury. It is not enough that the daughter returned to his house before the child was born, and he paid the expenses of her sickness: *Postlethwaite v. Parkes*, 8 Burr. 1878; *Nickleon v. Stryker*, 10 Johns. 115 [6 Am. Dec. 818]. These were actions of trespass for assaulting the daughter and getting her with child; but they rest on the same general principle as the action on the case. Lying-in or other expenses paid by the father, though they may enhance damages, are not a substantive ground of action: *Logan v. Murray*, 6 Serg. & R. 175 [9 Am. Dec. 422]; *South v. Denniston*, 2 Watts, 474; *Grinnell v. Wells*, 17 Man. & G. 1033; S. C., 8 Scott N. R. 741. The gist of the action is loss of service.

When a female under age is seduced after the death of her father, and while in service of one standing *in loco parentis*, he may bring the action. It will lie in favor of a guardian: *Ferneler v. Moyer*, 3 Watts & S. 416 [39 Am. Dec. 33]; an uncle or aunt who has brought up a niece: *Manvell v. Thomson*, 2 Car. & P. 303; *Edmondson v. Machell*, 2 T. R. 4; or one who has adopted and bred up the daughter of a deceased friend: *Irwin v. Dearman*, 11 East, 23; *Ingersoll v. Jones*, 5 Barb. 661. *Moritz v. Garnhart*, 7 Watts, 302 [32 Am. Dec. 762], was an action by the putative grandfather of an illegitimate child, for the abduction of the child, and has little to do with the present inquiry.

In *Sargent v. —*, 5 Cow. 106, the action was brought by the mother, after the death of her husband, for debauching her minor daughter, who at the time of the injury was in the service of a third person, to whom she was bound by indenture; but before the child was born the indentures were canceled, and the daughter returned to the service of her mother. It was said that the action would lie; but the case went off on another ground, and the point was not necessarily decided. The *dicta* in that case cannot be supported without an entire departure from the principle on which the action rests. There was no relation of master and servant between the plaintiff and the daughter, either actual or constructive, at the time of the seduction. On the contrary, the daughter was then actually the servant of another, who had a legal right to her services; and in that respect the case not only stands alone, and wholly unsupported, but it is in conflict with the whole current of authority on the subject. If the daughter had not been bound to the third person, there would still have been an insuperable difficulty in the fact that she did not live with her mother at the time of the seduction; for at the common law the mother has not, like the father, a legal right to the services of a minor child; and there is consequently no ground for implying the relation of master and servant between them. The relation must be actual, or it cannot exist. The case of *South v. Denington*, 2 Watts, 474, is directly in point. The action was brought by the mother for the seduction of her minor daughter, who lived with the defendant's father at the time of the injury, but returned to the service of her mother, and was attended by her during the lying-in sickness. It was held that the action could not be supported, because there was no actual and could be no constructive relation of master and servant at the time of the seduction. In *Coon v. Moffett*, 2 Pen. 583 [4 Am. Dec. 392], the seduction was in the life-time of the father, but the child was not born until after his death; the mother paid the lying-in expenses of the daughter; and two judges, against Chief Justice Kirkpatrick, were of opinion that the mother might maintain an action; but the case was disposed of on another ground. The same question arose in *Logan v. Murray*, 6 Serg. & R. 175 [9 Am. Dec. 422], and it was adjudged that the mother could not maintain an action, because the daughter was not in her service, but the service of the father, at the time of the seduction. *Davies v. Williams*, 10 Ad. & El., N. S., 725, is another case in point. The daughter was seduced by the

defendant while in his service, and in consequence of her pregnancy, returned to her mother, who maintained her until after her confinement. Lord Denman ordered a nonsuit in an action brought by the mother, which was confirmed by the whole court. Patteson, J., said: "To support such an action, the defendant's act must have been wrongful to the plaintiff;" and he asks: "How is the seduction wrongful to the plaintiff, unless the relation of master and servant subsists at the time of the seduction?" Colridge, J., added: "Where such relation is contracted after the seduction, the state of the case is, that the master employs a servant who is less valuable by reason of an antecedent occurrence; there is no consequential injury of which he can complain."

And in relation to the same point, it was well remarked by Gibson, C. J., in *South v. Denniston*, 2 Watts, 477, "that a party cannot entitle himself to an action for what was no wrong to him, by employing a disabled servant. An action for loss of service would certainly not lie for beating one who was not in the plaintiff's service at the time, because it would be esteemed an act of folly in him to employ an unfit person; and it must necessarily be indifferent, in point of principle, whether the unfitness was caused by beating or by impregnation." It is quite clear that the reasoning of Mr. Justice Sutherland, in *Sargent v. —*, 5 Cow. 106, cannot be supported. And I will mention here that the case of *Ingersoll v. Jones*, 5 Barb. 661, was open to the objection that the seduction took place while the girl was in the service of a third person, and the plaintiff—not being her father—had no legal right to her services at the time. But it does not appear that the point was made by the bill of exceptions; and the case cannot therefore be regarded as an authority on the question under consideration. Several attempts have recently been made in England to maintain the action upon other grounds than those which have been mentioned; but they have all failed, as will be seen by referring to the following cases: *Harris v. Butler*, 2 Mee. & W. 539; *Blaymire v. Haley*, 6 Id. 55; *Grinnell v. Wells*, 7 Man. & G. 1033; S. C., 8 Scott N. R. 741; *Eager v. Grimwood*, 1 Exch. 61; and see *Satterthwaite v. Dewhurst*, 4 Doug. 315. Our cases stand on the same foundation, with only this difference, that we go further than the English courts in making out the constructive relation of master and servant, and hold that it may exist for the purposes of this action, although the daughter was in the service of a third

person at the time of the seduction, provided the case be such that the father then had a legal right to her services, and might have commanded them at pleasure.

It is but natural that an upright magistrate should feel great indignation towards a seducer, and should sympathize warmly with those who have been injured; and judges have often regretted that the right to sue was confined within such narrow limits. It seems even to have been thought a reproach to our law that somebody should not have an action whenever an unmarried woman is gotten with child. If this be a just view of the matter, the reproach does not rest upon the courts, but on the legislature, whose office and duty it is to make and amend the laws. The courts went to the full length of their powers when they held that the relation of parent and child might be regarded as that of master and servant for the purpose of supporting this class of actions.

Now what is this case? The plaintiff was not the natural parent, but the step-father, of Gitty Ellen McGarey, having married her mother when the daughter was five years old. Gitty lived in the plaintiff's family until she was about seventeen years old, and then left, without any intention, so far as appears, of ever returning to live there again. The judge would not allow the defendant's counsel to ask the girl whether there was any *animus revertendi*, and for all the purposes of this case, we must assume that there was none. She left on account of a difficulty with the plaintiff, which resulted in his telling her to leave his house; and she did not return, except for the purpose of visiting her mother, until five months after the seduction. At the time the child was begotten she was in the service of a third person, and had been in the service of persons other than the plaintiff more than a year and a half immediately preceding that time. When she was five months gone in pregnancy, she returned to live with the plaintiff, at his request, and he paid her six shillings a week for her services down to the time of confinement. Upon this case, it is entirely clear that the relation of master and servant did not exist between the plaintiff and the girl at the time of the seduction. There was no such relation in fact; and as the plaintiff was neither bound to support his step-daughter, nor had any right to her services—*Tubb v. Harrison*, 4 T. R. 118; *Cooper v. Martin*, 4 East, 76; *Overseers of Poor v. Cox*, 7 Cow. 235; *Gay v. Ballou*, 4 Wend. 403 [21 Am. Dec. 158]; *Freto v. Brown*, 4 Mass. 675—there was no ground whatever for implying the

relation, as there might have been, had the action been brought by the father by nature. Any other person who had hired the girl when in a state of pregnancy would have just as good a right to sue as the plaintiff, and we cannot allow this action to succeed without a plain departure from settled principles.

The difficulty was felt by the plaintiff's counsel, and it was pretty plainly intimated that we ought to legislate for this case. If the prerogative of making laws had been intrusted to the courts, there is not much probability that I should exercise it in such a way as would answer the plaintiff's purpose. I might think that private virtue and public morals would more certainly be promoted by restricting than by extending the use of this class of actions. It is worthy of grave consideration whether it would not be well for the legislature to restore the old rule, by limiting the recovery to the value of the services lost and the amount of expenses incurred in consequence of the injury. Parents would not be less watchful over their daughters for knowing that they could not make a pecuniary profit by their dishonor; and females would not be less chaste if they knew that disgrace and shame, without any reward, would certainly follow transgression. Although it is true that money, however large the amount, will not always heal the wound, it can hardly be doubted that the heavy verdicts which are now usually given in seduction cases may sometimes prove a snare to both parent and child. The seducer deserves the severest censure; but if he is charged with anything more than the pecuniary damages resulting to the parent, it is well worthy of consideration whether the matter should not be regarded as a public rather than a private wrong. And if want of chastity is treated as a crime in one sex, it may be worth while to inquire whether it should not be so treated in the other. I know that our legislature, in the act to punish seduction as a crime, has not only taken a different view of the matter, but has allowed the polluted woman to be a witness against her associate in the transgression: Stat. 1848, c. 111. But it is very questionable whether such laws will do any good; and those who have read the history of Joseph cannot but fear that they may do great harm. I am not yet a convert to the modern doctrine that woman's virtue should be fenced about by penal statutes. If it has no higher and more holy shield, it certainly will not withstand the trial. If such laws were not intended for good, I should regard them as an insult to the sex.

There is nothing in this particular case which should tempt

us to amend the law, if we had the right to do it, for the purpose of upholding the recovery. Although Gitty was a witness on the trial, there is not a particle of evidence to show that there was anything like seduction in the case. For aught that appears, she may have been as much in fault as the defendant. And besides, she has no title to any part of the recovery; it all belongs to the plaintiff. There is no tie of blood between him and the girl; and neither owes any duty or obligation to the other. He has not lost a farthing in point of estate; and if we may judge from his conduct in dismissing the girl from his house, he has probably suffered very little in point of feeling. The wrong of which he complains was not done to him, his child, or his servant. He was in no condition to sue; and has done nothing to gain a title to the action but to employ a pregnant woman, and pay her stipulated wages. And yet he has not only been allowed to recover, but he has a verdict for a thousand dollars damages. The money belongs to him; he is under no obligation to share it with the girl, or to do anything for her support. If such a verdict may be had in such a case, the hiring of a pregnant female into one's service will be a profitable business.

The recovery is as clearly wrong in point of principle as it is erroneous in point of law.

Judgment reversed.

RIGHTS, DUTIES, AND LIABILITY OF STEP-PARENTS AND STEP-CHILDREN.—It is well settled that unless a step-parent stands *in loco parentis* towards his step-child, no rights or duties recognised by the law, differing from those between strangers, exist between them: *Tubb v. Harrison*, 4 T. R. 118; *Cooper v. Martin*, 4 East, 76; *Freto v. Brown*, 4 Mass. 675; *Worcester v. Marchant*, 14 Pick. 510; *Bond v. Lockwood*, 33 Ill. 212; *Mowbry v. Mowbry*, 64 Id. 383; Schouler's Domestic Relations, sec. 273. It is a practical question, therefore, to be determined in any particular case, whether or not the relation of parent and child has been assumed between them.

STEP-CHILDREN'S RIGHT TO EARNINGS.—Where a step-child is employed by a third person, the step-father has no right to his earnings: *Freto v. Brown*, 4 Mass. 675; but where a step-child is taken into the family of his step-father, and lives there as one of the family, the relation of parent and child being assumed, he cannot recover from his step-father, for services rendered the latter, while a minor, except, perhaps, where a contract or understanding exists that wages shall be paid: *Williams v. Hutchinson*, 3 N. Y. 312; 5 Barb. 122; *Brush v. Blanchard*, 18 Ill. 46; *Lantz v. Frey*, 19 Pa. St. 366; S. C., 14 Id. 201; and to entitle a step-son to recover from his step-father compensation for services rendered while the son remained a member of the step-father's family, after attaining his majority, the jury must be satisfied by a preponderance of evidence that there was an express promise to make compensation; such promise may, however, be established by cir-

cumstantial evidence, but will not be implied from rendering and accepting services: *Wells v. Perkins*, 43 Wis. 160. On the other hand, when a step-parent does not stand *in loco parentis* to his step-child, the latter may recover for services rendered the former; this was held in *Meleor v. Lanagan*, 6 Phila. 232, where a step-daughter remained with her step-father after her mother's death, she being called from a lucrative position to attend upon him. The right to compensation for services rendered between step-parents and step-children is correlative; thus in *Murdock v. Murdock*, 7 Cal. 511, where the plaintiff was the step-mother of the defendants, by whom she was supported, and for whom she performed domestic services, it was held that as she stood *in loco parentis* to the defendants, the law did not imply any contract to pay for such services.

STEP-PARENTS' RIGHT TO COMPENSATION FOR SUPPORT, EDUCATION, ETC., OF STEP-CHILDREN.—A husband is not liable for the expenses of maintaining his wife's child by a former marriage: *Tubb v. Harrison*, 4 T. R. 118; and see *Overseers etc. of Minden v. Cox*, 7 Cow. 235, with reference to his wife's illegitimate child. Lord Kenyon, who decided the first of these cases, afterwards distinguished it in *Stone v. Carr*, 3 Esp. 1, in that while there was no doubt that a man might refuse to provide for his wife's children by a former husband, and could not be compelled to do it, yet if he took them into his family, he stood *in loco parentis* to them, and was liable. And it is undoubtedly the law that nothing can be recovered by or allowed to a step-father for the maintenance and education of his step-child, in the absence of a special agreement, if the parental relation has been assumed: *Sharp v. Cropsey*, 11 Barb. 224; *Gerdes v. Weiser*, 54 Iowa, 591; *Bradford v. Bodfish*, 39 Id. 681; *Douglas's Appeal*, 82 Pa. St. 169; *Hussey v. Roundtree*, Busb. 110; *Gillett v. Camp*, 27 Mo. 541; *Smith v. Rogers*, 24 Kan. 140; S. C., 36 Am. Rep. 251; *Mowbry v. Mowbry*, 64 Ill. 383. And an action for board and tuition furnished a step-daughter by a third person will not lie against a step-father, unless he held the step-daughter out to the world as a member of his own family, in which case he stands *in loco parentis* to her, and incurs the same liability with respect to her that he is under to his own children: *St. Ferdinand Loretto Academy v. Bobb*, 52 Mo. 357; and see *Tubb v. Harrison*, 4 T. R. 118; but if the children are maintained by their step-father, it is a good consideration for a promise by them, when they come of age, to repay the expense of their maintenance: *Cooper v. Martin*, 4 East, 76. In *Sharp v. Cropsey*, *supra*, the following rule was laid down by King, J.: "The step-father is not bound to support his step-children, nor the latter to render him any services; but if he maintains them, or they labor for him, they will be deemed to have dealt with each other in the character of parent and child, and not as strangers, without obligation on the part of the father to pay for his children's services, or on the part of the children to remunerate their father for their support.

Gay v. Ballou, 4 Wend. 403, S. C., 21 Am. Dec. 158, was an action brought by a step-father against a step-son for the latter's maintenance while he was an infant. The defendant, when his mother married the plaintiff, went to live with the latter. It was proved that after the defendant came of age he said he was willing to settle with the plaintiff, and pay him what he owed him. It was held that a husband is not bound to maintain his wife's child by a former husband; and that the defendant's admissions afforded sufficient evidence that the items of the plaintiff's account were furnished at the defendant's request, and being suitable and necessary for a person in his condition, the law implied a promise on his part to pay for them; but it was said in *Sharp*

v. *Propoy*, 11 Barb. 224, that this case "must be considered as overruled, so far as it holds that a step-son is liable, either upon an implied promise or upon an express promise during minority to pay for necessities furnished by his step-father." To recover for the maintenance, etc., of a minor step-daughter, after her death, she having resided with her step-father as a member of his family, the father must prove a contract with her guardian: *Ruckman's Appeal*, 61 Pa. St. 251; but where a step-father receives the children into his family as their legally appointed guardian, and as such renders his account for expenditure, from year to year, and such accounts are allowed by the county court, the presumption that he is providing for them gratuitously does not arise: *Bond v. Lockwood*, 33 Ill. 212. Where the defendant, who had taken his wife's child into his family when the child was three months old, and boarded him, and furnished him with clothing and other necessities, as one of his own children, made a report as guardian of the child, in which he claimed compensation for his support, it was held that under these circumstances the relation was that of parent and child, with like obligations: *Gerdes v. Weiser*, 54 Iowa, 591. And where a widow at the time of her remarriage was entitled, as the guardian of a child seven years old, to receive a pension for him until he arrived at the age of sixteen, and it was agreed that the child should live with the step-father, and understood between the step-father and mother that the pension should be given to the former for the support of the child, which was accordingly done, it was held in an action by a new guardian to compel the mother to account for the pension, that she was entitled to be credited with the reasonable value of the support and maintenance of the child while he lived with the step-father: *Hill v. Hanford*, 11 Hun, 536.

By the statute of 4 & 5 Wm. IV., c. 76, sec. 757, step-fathers are bound to maintain their step-children, whether they be legitimate or illegitimate, until they arrive at the age of sixteen, or until the death of their mother; prior to this they were not so bound, the statute 43 Eliz., c. 2, sec. 77, in relation to supporting relatives, being held to apply only between natural parents and children, and not to relationship by marriage: *Ree v. Monday*, 1 Stra. 190; *Tubb v. Harrison*, 4 T. R. 118; and see *Worcester v. Marchant*, 14 Pick. 510, as to the construction of a similar American statute to that of Elizabeth.

FURTHER RIGHTS OF STEP-PARENTS.—A step-father, having adopted his wife's daughter as a member of his family, may sue for her seduction: *Maguinay v. Sauder*, 5 Sneed, 146; and he may sue although the daughter be illegitimate: *Bracy v. Kibbe*, 31 Barb. 273. A step-father, standing *in loco parentis* to his wife's children, has a right of reasonable chastisement to enforce his authority: *Gorman v. State*, 42 Tex. 221. Under a statute providing that every master of a ship that shall carry out of the government an infant, without the consent of his parent, shall be liable for the damages sustained by the parent, in a special action on the case, no action can be maintained by the infant's mother and step-father, for they have no legal right to the minor's society and services: *Worcester v. Marchant*, 14 Pick. 510.

WHO MAY SUE FOR SEDUCTION.—This subject will be found elaborately discussed in the note to *Weaver v. Bachert*, 44 Am. Dec. 165; and see, further, *Palmer v. Oakley*, 47 Id. 41, as to the right of a guardian to sue for seduction of his ward. The action for seduction is not maintainable upon the relation of parent and child, but solely upon that of master and servant: *White v. Nellis*, 31 N. Y. 407; *Furman v. Van Sise*, 56 Id. 441, *per* Allen, J., dissenting, both citing the principal case; note to *Weaver v. Bachert*, *supra*; *Vossel v. Cole*, 47 Am. Dec. 136; and if the daughter is of full age, the action can-

not be maintained by the father unless she was actually in his service at the time of the injury: *Nickleon v. Stryker*, 6 Id. 318; *Mercer v. Walmsley*, 9 Id. 486; *Patterson v. Thompson*, 24 Ark. 66, citing the principal case; and this was so held in *McDaniel v. Edwards*, 47 Am. Dec. 331, although she was working for a third person under a contract made by the father, who was to receive her wages; if, however, the relation of master and servant exists, the father may sue notwithstanding the daughter is over the age of twenty-one: *Vossel v. Cole*, Id. 136. Where a daughter, who was twenty-nine years old, and resided with her father, performing certain domestic services, being supplied by him with food and clothing, was absent during the time of seduction, assisting, with other neighbors, the defendant in preparing for entertainments, but remained longer than the others, it was held, if the question were at all doubtful whether the daughter, by these acts, entered into the service of the defendant, so as to bring the case within *Bartley v. Richtmyer*, it was proper to submit it to the jury: *Lipe v. Eisenlard*, 32 N. Y. 235; Campbell, J., dissented, after reviewing the facts of the case, saying (p. 730), that at the time of the seduction she was not her father's servant *de jure*, for he had no right to recall her, nor *de facto*, for she was working for the defendant, and if not for wages to be paid to her, certainly not for wages to be paid her father, concluding with: "This judgment, if sustained and recovered, goes to the father, and not to the daughter; we might apply in this case some of the remarks of Bronson, C. J., in *Bartley v. Richtmyer*."

And if the daughter is of full age, and absent from her father's house when the injury is committed, but returns after seduction, and is there delivered at the expense of the father, the latter cannot sue for seduction: *Nickleon v. Stryker*, 6 Am. Dec. 318; and *Patterson v. Thompson*, 24 Ark. 66; *Furnam v. Van Sice*, 56 N. Y. 442, per Allen, J., dissenting, both citing the principal case. The action may be maintained by a father, notwithstanding the daughter is not actually in his employ, if he is legally entitled to her services: *Mulvehall v. Millward*, 11 N. Y. 346; *Lavery v. Crooks*, 52 Wis. 617; *Ingersoll v. Miller*, 47 Barb. 51; *Cretwell v. Hoyt*, 6 Hun, 581, per Merwin, J., dissenting; *Bolton v. Miller*, 8 Ind. 265; *Mages v. Holland*, 27 N. J. L. 96; *Patterson v. Thompson*, 24 Ark. 66. The father, however, must have had the right to the services of his daughter; therefore, the action is not maintainable by the father of an indentured servant against the master by whom she was seduced: *Dain v. Wycoff*, 7 N. Y. 194, 195, all citing the principal case; and see further, on the father's right to recover for the seduction of his daughter when she is constructively but not actually in his service, *Martin v. Payne*, 6 Am. Dec. 288; *Hornbeth v. Barr*, 11 Id. 568; *Emery v. Gowen*, 16 Id. 233; *Clark v. Fitch*, 20 Id. 639; *Boyd v. Byrd*, 44 Id. 740; note to *Weaver v. Bachert*, Id. 166. Where the illegitimate daughter of his wife by another man was adopted by the plaintiff, and bred and brought up by him, he stands *in loco parentis*, and may sue for seduction: *Bracy v. Kibbe*, 31 Barb. 275, citing the principal case; and see *Moritz v. Garnhart*, 32 Am. Dec. 762, as to the right of one standing *in loco parentis* to sue for seduction. Loss of service is the only ground upon which an action by the father for the seduction of his daughter may be maintained, but the loss of service need not be great; slight loss is sufficient: *Knight v. Wilcox*, 15 Id. 280; and see *Sawyer v. Sauer*, 10 Kan. 523; *Ellington v. Ellington*, 47 Miss. 348; in which two latter cases the principal case is somewhat criticised; and *Kahn v. Freytag*, 2 Robt. 679, all citing the principal case; see also *Wallace v. Clark*, 5 Am. Dec. 654; *Mercer v. Walmsley*, 9 Id. 486; note to *Weaver v. Bachert*, 44 Id. 166, in regard to the proposition that slight loss of service is

sufficient. In *Badgley v. Decker*, 44 Barb. 588, 589, it was said, citing the principal case, that the rule is still adhered to that the loss of service is the legal *gravamen* of the action for seduction, but the court go on to say that the real *gravamen* is not the loss of service, but is the mortification and disgrace of the family, and the wounded feelings of the plaintiff.

In regard to the right of the mother to sue for the seduction of her daughter, there is some conflict of opinion: See *Coon v. Moffett*, 4 Am. Dec. 392, and note; *Logan v. Murray*, 9 Id. 422; *Vossel v. Cole*, 47 Id. 136. The principal case was cited in *Keller v. Donnelly*, 5 Md. 217, as fully collecting and commenting on the cases in which such an action had been brought; and in *Patterson v. Thompson*, 24 Ark. 66, to the point that the relation of master and servant not existing, a step-father cannot recover, nor a mother for the seduction of her daughter, in the life-time of her father. It was also cited in *Lampman v. Hammond*, 3 Thomp. & C. 294, in considering the mother's right to sue, to the point that the right of action is based on the relation of master and servant, and not upon that of parent and child, but the father may maintain the action for seduction of his minor daughter upon the presumption without proof of a loss of services, because he is entitled to command such service. The action was sustained in this particular case. The criticism of *Sargent v. —*, 5 Cow. 106, in the principal case, and the remarks therein adverse to the right of a mother to maintain the action, are in turn criticised in *Gray v. Durland*, 50 Barb. 104, Miller, J., saying that they were uncalled for, as no such point arose in the case, nor did it appear that the question was discussed whether the mother, after the death of the father, had a legal right to maintain the action. Hogeboom, J., in his dissenting opinion, p. 215, while he admits that it was not decided by the principal case that a mother could not maintain the action, lays great stress on the "large and learned discussion" of Mr. Justice Bronson on the point. When *Gray v. Durland*, came before the court of appeals in 51 N. Y. 429, it was said, citing the principal case, that the question, "Is a widowed mother entitled by law to the services of her minor child?" was not free from doubt; but it was held that when the minor daughter is actually in her widowed mother's service, the mother can maintain an action against one who debauches her daughter, for loss of services resulting therefrom. But in holding that a mother has a legal right to the services of her minor children after the death of the father, in *Furman v. Van Sise*, 56 Id. 438, Mr. Justice Bronson's remarks were again said not to be involved in the case; and an action was held maintainable by a widowed mother for the seduction of her minor daughter, where the latter was in the employ of another at the time of the seduction, under an agreement with the mother, the daughter receiving wages and applying them to her own use with the mother's assent, but after the seduction the daughter returned to her mother, who cared for her during her confinement, and paid the expenses incurred thereby. Allen, J., however, in his dissenting opinion (p. 446), cited the principal case to the point that the law does not recognize the relation of master and servant as constructively existing between a mother and child, and the mother can only claim the benefit of the relation so long as it actually exists.

DAMAGES IN CASE OF SEDUCTION.—The language of the principal case that a master ought not to recover anything more than compensation for the pecuniary loss he has sustained, but that it was settled that a father may recover exemplary damages for the seduction of a daughter, is quoted with approval in *Wilhoit v. Hancock*, 5 Bush, 571, in considering the question of damages in an action by the father for the seduction of his daughter; and the

injured feelings of a father may be taken into consideration: *Badgley v. Decker*, 44 Barb. 592; *Knight v. Wilcox*, 18 Id. 221, both citing the principal case; *Emery v. Gosen*, 16 Am. Dec. 233; note to *Weaver v. Backert*, 44 Id. 177; but the bare fact of a criminal intercourse is not sufficient to justify exemplary damages: *Hogan v. Oregon*, 6 Robt. 154, quoting at length from the principal case. A verdict for three thousand dollars had been given in an action for seduction, and the court, in refusing to grant a new trial on the ground of excessiveness of damages, said that the verdict of one thousand dollars given in the principal case was not complained of as excessive: *Travis v. Barger*, 24 Barb. 629.

MISCELLANEOUS CITATIONS OF PRINCIPAL CASE.—Cited, among others, in *Long v. Morrison*, 14 Ind. 597, to the point that at common law two actions lay for personal injuries to married women, infants, and servants: one by the husband, father, or master for the loss of service, etc.; the other by the husband and wife, the infant, or servant, for the personal injury; in *Smith v. City of St. Joseph*, 55 Mo. 459, as laying down the principle that where a married woman is injured, two actions for damages exist: one for the wife's personal injuries, in which a claim for expenses of her cure cannot be recovered; the other for expenses and loss of services; in the first action the husband would have no interest, while the latter would accrue to him alone; in *Robalina v. Armstrong*, 15 Barb. 249, as distinctly affirming the doctrine that for a personal injury—as assault and battery and false imprisonment—to a child, the action must be in the child's name. The language, "at the common law the mother has not, like the father, a legal right to the services of a minor child," is quoted in *M. B. v. M. C. B.*, 8 Abb. Pr. 48, S. C., 28 Barb. 303, in holding that the application by the mother of a married infant, as her natural guardian, to have a decree of divorce obtained against the daughter opened, to be appointed guardian *ad litem*, and for leave to defend the action, setting forth facts tending to show collusion, must be denied, since a mother had no such interest in the matter as would allow her to become a party to the litigation. Where the plaintiff alleged that the defendant, "with force and arms, ill-treated and made an indecent assault upon her, and then and there debauched and carnally knew her," it not being alleged that she was ravished without her consent, the complaint should be considered as an action brought for debauching and seducing the plaintiff, which could not be maintained by the party seduced: *Koenig v. Nott*, 2 Hilt. 334; S. C., 8 Abb. Pr. 303, *per* Hilton, J., dissenting. The right of action for seduction was held to rest in tort and die with the person in *Holliday v. Parker*, 23 Hun, 74; Learned, P. J., dissenting, holding that an injury to the plaintiff's right to services, by seduction, was an injury to property, although it was true the plaintiff might recover for injury to his feelings—such recovery being in the nature of punitive damages—citing the principal case.

DOTY v. BROWN.

[4 NEW YORK (4 COMSTOCK), 71.]

FORMER JUDGMENT IS CONCLUSIVE when the parties and the question involved in the two suits are the same, notwithstanding the property claimed in them may be different.

PAROL EVIDENCE IS COMPETENT TO SHOW WHAT QUESTIONS WERE ACTUALLY CONTROVERTED and decided in a justice's judgment, for the purpose of

determining what questions are concluded by it when it is offered as a bar to a second action.

APPEAL from a judgment of the supreme court in favor of defendant in replevin. The question was upon the effect of a justice's judgment rendered under the following circumstances: One Sisson, the former owner of the stock of a farm of which the property claimed in this suit was part, made a bill of sale of the whole to Doty, the present plaintiff, and Doty paid the price and took possession. A few days after this transaction, Brown, the defendant, a constable, levied attachments issued at suit of creditors of Sisson, upon the whole parcel of farm stock embraced in the bill of sale, claiming it as the property of Sisson, on the ground that the sale to Doty was fraudulent and void as against Sisson's creditors. The property however was not taken from Doty's possession, and he not long afterwards used a portion of it; for doing which Constable Brown sued him before a justice of the peace (Tracy). Doty defended on the ground of his purchase from Sisson; but the justice found this transaction to have been fraudulent, and Brown therefore recovered judgment for that portion of the farm stock embraced in the bill of sale which Doty had converted. Thereafter Brown seized the residue of the stock embraced in the bill of sale, in virtue of executions issued in favor of the attaching creditors of Sisson. Doty then brought this action to recover back the portion thus seized. But the judge before whom the cause was tried ruled that the justice's judgment was a bar to the suit, because Doty was claiming in virtue of the same bill of sale which the justice had adjudged fraudulent and void. The court sustained this ruling, and Doty appealed.

D. Gray, for the appellant.

Ransom Balcom, for the respondent.

By Court, RUGGLES, J. The title of the plaintiff Doty to the property replevied by him from Brown, depends entirely on the validity of the bill of sale executed to him by Sisson, bearing date on the thirteenth of October, 1843. If that was fraudulent as against the creditors of Sisson, who had obtained judgments against him, and put executions into the hands of the constable, Brown, the plaintiff Doty must necessarily fail in his replevin suit.

The question of fraud was tried between these same parties in the former suit before Justice Tracy, and there determined

against the validity of the bill of sale. The goods in question are not the same that were in question in that suit. But the goods in controversy there were part, and the goods now in litigation are the residue, of what Brown seized as constable under one and the same levy. Doty claimed all the goods in that suit and in this, under his bill of sale from Sisson; and Brown claims them all by virtue of one and the same levy under the same executions. The question, therefore, so far as relates to Doty's title, was identically the same in both suits. If the bill of sale was fraudulent and void with respect to the goods claimed by him in the first suit, it must be fraudulent and void with respect to the goods in question here.

In the action before the justice brought by Brown against Doty, Brown declared for and at first claimed to recover, for all the goods levied on. This claim of course embraced the goods which are the subject of the present controversy. But discovering that Doty had done no act amounting to a conversion of the goods now in question, he withdrew his claim to recover for them, and proceeded only for the value of goods which Doty had sold or otherwise converted. The former judgment stands, therefore, on the same footing as if the goods now in controversy had not been included in the declaration in the first suit.

The jurisdiction of the two courts was concurrent. If Brown had recovered one hundred dollars for the whole of the goods, his recovery would have been a perfect bar to a subsequent claim, and an answer to the defense he now sets up.

The plaintiff Doty insists, however, that the former judgment, by which the bill of sale from Sisson to him was adjudged to be fraudulent, is not conclusive against him on that point in this suit, because the goods for which this suit is brought are not the same goods for which the former recovery was had, and that the two suits not being for the same subject-matter, the whole question as to the title to the goods now in controversy is open and unaffected by the former decision. But the settled principle of law appears to be that the same point or question, when once litigated and settled by a verdict and judgment thereon, shall not again be contested in any subsequent controversy between the same parties depending on that point or question.

This was so adjudged in the case of *Gardner v. Buckbee*, 3 Cow. 120 [15 Am. Dec. 256]. It was an action in the New York common pleas on one of two notes given on the purchase

of a schooner. The same plaintiff had previously brought an action in the marine court of that city, on the other note given upon the same purchase, to which the defendant set up as a defense that the schooner was rotten and unseaworthy, and the sale fraudulent. The defendant prevailed in his defense on that point in the marine court, and had judgment. In the subsequent suit in the common pleas, upon the other note, the defendant gave in evidence the record of judgment in his favor in the marine court, in the suit in which the sale was adjudged to be fraudulent, and insisted upon it as a bar. The common pleas decided that it was not a bar, and the plaintiff had a verdict; but the judgment of the common pleas was reversed in the supreme court, and the former judgment on the same point, in the action on the first note, was held to be a bar to a recovery on the second note given upon the same purchase.

The case of *Outram v. Morewood*, 3 East, 346, is substantially to the same effect. This was trespass for breaking and entering into a coal mine and taking coals. The defendant pleaded title to the coal mine, and that the vein of coal in which the trespass was supposed to be committed was part and parcel of the mine, and included within the conveyance under which he derived his title. The plaintiff replied that the defendant ought to be estopped from averring that the place in question was included within his conveyances, because in 1792 (long before the supposed trespass) the plaintiff brought an action against the defendant for a former trespass in taking coals from the same place, to which the defendant pleaded the same title, and that the jury in the former case found that the place in question was not part and parcel of the land so conveyed to him. The defendant demurred to the replication, and judgment was rendered for the plaintiff. In that case, although the last action was for a different trespass, committed long after that for which the first suit was brought, yet inasmuch as the defendant in the last suit relied on the same title set up in the first, in which the question was decided against him, he was even precluded from setting up the same title a second time.

The case of *Burt v. Sternburgh*, 4 Cow. 559 [15 Am. Dec. 402], is a further illustration of the same principle. This was an action of trespass for entering on the plaintiff's land and cutting timber. The defendant claimed the land as his own, and had cleared and fenced it. The plaintiff claimed the land as part of the Schoharie patent. The defendant claimed it as part of Weyfield and Clifford's patent. The plaintiff gave in

evidence a record of judgment in the supreme court, in which he was plaintiff and Sternburgh defendant, showing a verdict and recovery for a former and different trespass. He further proved by parol that the former trespass for which he had recovered was at the same spot of ground, and that the question on the former trial was whether the land lay within the Schoharie patent or within Weyfield and Clifford's. It was adjudged that the former determination of that question was conclusive between the parties, the plaintiff's right of recovery and the defendant's defense in the second action depending on the same question of title tried and determined in the first.

In each of these cases, the cause of action in the second suit was different from the cause of action in the first; but the former determinations were held to be conclusive, because the same question was determined in the first suit, on which the second depended. The same principle is decided in the case of *Bouchaud v. Dias*, 3 Denio, 238. But it is unnecessary to refer to further authorities.

Parol proof was properly admitted to show what was actually in controversy between the parties before Justice Tracy, and the grounds on which his judgment was rendered: *Wood v. Jackson*, 8 Wend. 9 [22 Am. Dec. 603]; *Young v. Rummell*, 2 Hill (N. Y.), 478; *Gardner v. Buckbee*, 3 Cow. 120 [15 Am. Dec. 256]; *Bouchaud v. Dias*, 3 Denio, 238; *Beebe v. Elliott*, 4 Barb. 457; *Burt v. Sternburgh*, 4 Cow. 559 [15 Am. Dec. 402].

It was unnecessary that the former judgment should be specially pleaded. The defendant was a public officer, and under the general issue was entitled to make any defense which could have been specially pleaded: 2 R. S. 353, secs. 28, 29.

The counsel for Doty insists, however, that the recovery by Brown, in the suit before the justice, for a part of the property levied on, is a bar to any claim on his part to the residue included in the same levy. This point rests on the supposition that by withdrawing his claim to recover for that part of the property now in controversy, he divided a single cause of action. But that is untrue in point of fact. Brown was not entitled in that suit to recover for the goods which Doty had not converted to his own use; and the goods replevied in this suit had not then been so converted. There was therefore no division or splitting of this cause of action. Even if he had not withdrawn his claim for the goods now in question, but as to those goods had failed to recover on the ground that Doty had not been guilty of converting them, his right to them

would not have been affected by the judgment, provided the ground of his failure in the first suit was distinctly made to appear. He might have recovered for those goods in a subsequent action of trover, on proof of a conversion subsequent to the commencement of his first suit.

The judgment of the supreme court should be affirmed, and the respondent is entitled to the costs of the appeal.

Ordered accordingly.

FORMER JUDGMENT, WHEN CONCLUSIVE.—The judgment of a court of competent jurisdiction upon a point or question litigated between the parties is conclusive in all subsequent controversies between the same parties or their privies, depending on the same point or question: *White v. Coatsworth*, 6 N. Y. 139; *Demarest v. Darg*, 32 Id. 290; S. C., 29 How. Pr. 275; *Miller v. White*, 50 N. Y. 144; *Harris v. Harris*, 36 Barb. 94; *Williams v. Fitzhugh*, 44 Id. 324; *Fake v. Smith*, 7 Abb. Pr., N. S., 110; *Goddard v. Benson*, 15 Abb. Pr. 193; *Demarest v. Daig*, 11 Id. 16; *Glackin v. Zeller*, 52 Barb. 151; *Hudson v. Smith*, 7 Jones & S. 461; *Jackson v. Lodge*, 36 Cal. 37; and this, although the subject-matter be different: *Castle v. Noyes*, 14 N. Y. 331; *Murray v. Lovejoy*, 2 Cliff. 201; *Hendricks v. Decker*, 35 Barb. 302; nor is it essential that the objects of the two suits should be the same: *Barker v. Cleveland*, 19 Mich. 235; nor that the parties should stand in the same relative positions to each other: *Barker v. Cleveland*, *supra*; *Craig v. Ward*, 36 Barb. 383. The plea of *res judicata* applies to every objection urged in a second suit, when the same objection was open to the party within the legitimate scope of the pleadings in a former one, and might have been presented in it: *Aurora City v. West*, 7 Wall. 96; thus a judgment in favor of a bondholder upon certain municipal bonds, part of a larger issue, against the town issuing them, is conclusive on a question of the validity of the issue, in a suit brought by the same creditor against the town, on other bonds, another part of the same issue, all objections taken by the town in the second suit having been open to be taken by it in the former one: *Beloit v. Morgan*, Id. 622. Since the revised statutes in New York, a judgment in ejectment has the same conclusive effect as obtains in favor of judgments in other classes of actions; that is, it is conclusive upon the parties to the action and their privies: *Sheridan v. Andrews*, 3 Lans. 132. But if a claim is withdrawn, or a part of it did not then exist or had not accrued, the judgment is no bar: *Baker v. Rand*, 13 Barb. 160; and to hold that a judgment in favor of defendants in an action to recover the price of goods sold, which proceeded upon the ground that they were sold on a credit which had not expired when the action was brought, is not a bar to a second action instituted after the credit has expired, does not conflict with the rule that "a fact which has once been directly decided shall not be again disputed between the same parties," nor with the rule that "the judgment of a court of concurrent jurisdiction directly on the point, is as a plea in bar, and as evidence, conclusive between the same parties upon the same matter directly in question in another court:" *Wilcox v. Lee*, 1 Abb. Pr., N. S., 255; S. C., 26 How. Pr. 422; 1 Robt. 359. Where, in an action to cancel a mortgage, as having been paid, the pleadings put in issue the fact, but not the amount due, and it was determined that the mortgage was not paid, but that a certain sum was due thereon, the adjudication is

conclusive upon the parties only of the fact that something was due, but not the amount: *Campbell v. Consalus*, 25 N. Y. 616; and where the defendant brought suit against a subscriber to its stock, for the recovery of the balance due on calls, but as to all installments except the one due under the last call the defense of the statute of limitations was sustained, and for that a judgment was recovered, it was held, in an action by the subscriber's receiver to compel the issuance to him of the shares of stock subscribed for, that the defendant was not estopped by the judgment from setting up the non-payment for and forfeiture of the shares: *Johnson v. Albany & S. R. R.*, 5 Lana. 225; and again, in *Hughes v. Alexander*, 5 Duer, 491, where one of two promissory notes, given in pursuance of a secret and fraudulent agreement with certain creditors of a failing debtor, was sued upon, nothing further than the note appearing as the cause of action, and judgment was taken by default, it was held, in a suit upon the other note, that since the fact whether or not the agreement was fraudulent was not decided, it might be contested in the second suit. In all the preceding the principal case was cited. See further, that a judgment binds only parties and privies, *Voss v. Morton*, 50 Am. Dec. 750; *Alexander v. Walter*, Id. 688; that a judgment is conclusive only on matters directly in issue, *King v. Chase*, 41 Id. 675; that a judgment between the same parties for the same cause of action is conclusive, *Agnew v. McElroy*, 48 Id. 772; and as to the conclusiveness of the record of a justice of the peace, *Mitchell v. Hawley*, 47 Id. 280, and the prior cases in the various notes thereto.

EVIDENCE TO SHOW WHAT WAS DECIDED, ETC., WHETHER ADMISSIBLE.—It is competent to show by evidence *aliunde*, whether a question was decided in a former suit relied upon as a bar, it often happening that this cannot be determined from the record: *Kerr v. Hays*, 35 N. Y. 337; *Smith v. Smith*, 79 Id. 635; *Royce v. Burt*, 42 Barb. 665; *Davis v. Talcott*, 14 Id. 620; *Mores v. Osborn*, 64 Id. 546; *Caperton v. Schmidt*, 26 Cal. 505; *Miles v. Caldwell*, 2 Wall. 42; *Lyman v. Becannon*, 29 Mich. 470, all citing the principal case; *Gardner Buckbee*, 15 Am. Dec. 256; *Estill v. Taul*, 24 Id. 498; *Bridge v. Gray*, 25 Id. 358; *King v. Chase*, 41 Id. 675, and note; and to identify the debt recovered by judgment against the defendant as garnishee with that sued upon: *Cook v. Field*, 36 Id. 436; also to show the grounds relied on in such former suit: *Eastman v. Cooper*, 26 Id. 600; *White v. Madison*, 26 N. Y. 130; S. C., 26 How. Pr. 491, citing the principal case; and to show what was really decided, where it is doubtful on the face of the record, whether the judgment proceeded upon questions of practice or upon the merits, or both: *Easterbrook v. Savage*, 21 Hun, 149; and see *Woodworth v. Seymour*, 22 Id. 246. That a justice's court had jurisdiction of the person of the defendant may be shown, where that fact did not appear by the proceedings: *Jolley v. Foltz*, 34 Cal. 327; and where a record of seizure and condemnation of certain property, under the revenue laws, did not disclose by whom or at what time the penalty was incurred which worked a forfeiture, it is competent to aid the record and supply the proof: *McKnight v. Devlin*, 52 N. Y. 403; but while it is true that parol evidence may be given for the purpose of showing what the actual controversy was in a former action, the evidence is inadmissible where the subject of controversy was still uncertain; as where summons and a notice of retainer was served, but no complaint: *Phelps v. Gee*, 29 Hun, 202, all citing the principal case. Judgments of courts of record cannot be contradicted or falsified by proof *aliunde*: *Bank of Tennessee v. Patterson*, 47 Am. Dec. 618.

RADCLIFF v. MAYOR ETC. OF BROOKLYN.

[4 NEW YORK (4 COMSTOCK), 195.]

MUNICIPAL CORPORATIONS ARE NOT LIABLE to lot-owners for injury to land or buildings caused by making a street improvement, where the work was authorized by law, and has been done with due care and skill, and no property of the plaintiff has been taken for public use.

CONSTITUTIONAL RIGHT TO COMPENSATION for private property taken for public use does not attach where there is no taking of property, but only an indirect or consequential depreciation of its usefulness or value.

DOCTRINE OF PROPERTY, the extent and limits of an owner's right to use that which is his, and the meaning of the maxim, *Sic utere tuo*, etc., explained, with reference to the liability of a land-owner for acts done by him on his own land which cause damage to an adjoining owner.

ERROR to revise a judgment sustaining a demurrer to a replication in an action of trespass on the case. The action was brought on behalf of a lot-owner in the city of Brooklyn against the city, for that the city, in grading Furman street, had dug away soil by which plaintiff's lot and the improvements on it were supported, causing them to fall; but there was no allegation in plaintiff's pleadings that the proceedings for laying out and grading the street were unauthorized or irregular, or that any land of plaintiff had been taken for the improvement, or that the city's agents or workmen had entered upon or excavated plaintiff's lot, or had acted maliciously or unskillfully. The city demurred, and the supreme court sustained the demurrer.

A. H. Dana, for the plaintiffs in error, the owners of the damaged land.

Henry C. Murphy, for the defendant in error, the city.

By Court, BRONSON, C. J. The common council of the city of Brooklyn has ample authority to lay out, open, grade, level, and pave streets within the city. When lands are taken for a street, the owner is to be paid his damages, to be assessed by commissioners. But there is no provision for paying consequential damages, or such as may result to persons whose lands are not taken: Stat. 1833, p. 499, secs. 1, 2, 16; Id. 1838, p. 119, secs. 1, 2. Such is my construction of the statutes touching the question.

Furman street, lying west of and adjoining the testator's premises, had been laid out prior to the digging of which the plaintiffs complain; but it had not then been opened or used as a highway. The digging was done in the site of the street for the purpose of grading and leveling the same for public use.

There was no excavation or any other act done by the defendants in or upon the testator's land. But in consequence of digging away the bank in the site of the street, which was a natural support of the testator's land, a portion of his premises fell into the street, and he suffered damage. There is no charge that the defendants acted maliciously; nor do the pleadings impute to them any want of skill or care in doing the work. The defendants are a public corporation; and the act in question was done for the benefit of the public, and under ample authority, if the legislature had power to grant the authority without providing for the payment of such consequential damages as have fallen upon the testator. Our constitution provides that private property shall not be taken for public use without just compensation. But I am not aware that this, or any similar provision in the constitutions of other states, has ever been held applicable to a case like this. Although the testator's property has suffered damage, I find no precedent for saying that it has been "taken for public use," within the meaning of the constitution.

This short view is enough, perhaps, to dispose of the case. But the wide range of discussion at the bar makes it proper to consider the matter more at large. As no question has been made on that subject, we must assume that the defendants had acquired the title to the lands in the site of the street, in the forms prescribed by law. In leveling and grading the street, they were at work in their own land, doing a lawful act for a lawful purpose. They did not touch the testator's property; and the question is, whether the damage which resulted to him in consequence of grading the street, must not be regarded as *damnum absque injuria*. The maxim, *Sic utere tuo ut alienum non lædas*, is not of universal application; for, as a general rule, a man who exercises proper care and skill may do what he will with his own property. He may not, however, under color of enjoying his own, set up a nuisance which deprives another of the enjoyment of his property. Nor can he rightfully enter or cast anything on the land of another, unless he have a license from the owner, or an authority in law for doing the act. And the absence of a bad motive will not save him from an action.

Thus, if one having a hedge on his own land adjoining another's close cut the thorns, and they fall, against his will, on his neighbor's land, from which he removes them as soon as possible, he may be treated as a trespasser. And if he lop a tree, and the boughs fall, against his will, on the land of an-

other; or if, in building his house, a piece of timber fall on the house of his neighbor; or if, through fear of his life by reason of threats, he enter the house of another and carry away his property—in all these cases an action lies: *Lambert v. Bessey*, T. Raym. 421. So, too, if in blasting rocks, for the lawful purpose of making a canal in his own land, fragments of the rock fall on the house or land of his neighbor, an action will lie: *Hay v. Cohoes Company*, 2 N. Y. 159 [51 Am. Dec. 279]; and *Tremain v. Cohoes Company*, Id. 163 [51 Am. Dec. 284]. Nearly allied to this is the common case of building a dam in one's own land, which throws back the water on the land or machinery of one higher up the stream; which is an actionable injury. And one cannot justify placing a spout on his house, which throws the water on the land of his neighbor. And though a man may use the water of a stream while it is passing through his land, he cannot rightfully divert the water from the land of another lower down the stream; nor can the water be taken to supply a city or town without making compensation to those who are thus deprived of its use: *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162 [7 Am. Dec. 526]. There is another class of cases of a somewhat different character, where a man must answer for the consequences of an act lawful in itself, because it was done in so negligent or unskillful a manner as to cause an injury to another. *Vaughan v. Menlove*, 8 Bing. N. C. 468, is a strong example of the kind. The defendant was held liable for constructing a hay-rick on the extremity of his land in so negligent a manner that spontaneous ignition followed, and the plaintiff's cottage was destroyed. And where public officers, having authority to construct and repair streets, make a culvert to pass a stream of water in so unskillful and improper a manner as to cause an injury to another by the choking of the culvert, they must answer in damages: *Rochester White Lead Company v. City of Rochester*, 8 N. Y. 463 [*ante*, p. 316]. These cases are enough to exemplify the rule that a man must so exercise a lawful authority and so enjoy his own property as not to injure the property of another.

But a man may do many things under a lawful authority, or in his own land, which may result in an injury to the property of others, without being answerable for the consequences. Indeed, an act done under lawful authority, if done in a proper manner, can never subject the party to an action, whatever consequences may follow. Nor will a man be answerable for the consequences of enjoying his own property in the way

such property is usually enjoyed, unless an injury has resulted to another from the want of proper care or skill on his part. In the cases already put, where an action will lie, the party either went beyond the enjoyment of his own property, and entered or cast something on the land of his neighbor; or he diverted a stream of water from the land of his neighbor, without having a title to anything more than the usufruct; or else he used his own property in such a negligent and improper manner as to cause an injury to another.

Let us now see what a man may do in the enjoyment of his own property without being answerable to others for consequential damages—always assuming that he acts with proper care and skill. He may set fire to his fallow-ground; and though the fire run into and burn the woodland of his neighbor, no action will lie: *Clark v. Foot*, 8 Johns. 421. He may open and work a coal mine in his own land, though it injure the house which another has built at the extremity of his land: *Partridge v. Scott*, 3 Mee. & W. 220. And he may do the same thing, though it cut off an underground stream of water which before supplied his neighbor's well, and leave the well dry: *Acton v. Blundell*, 12 Id. 324. He may build on his own land, though it stop the lights of his neighbor: *Parker v. Foote*, 19 Wend. 809; and even though he build for the very purpose of stopping the lights: *Mahan v. Brown*, 13 Id. 261 [28 Am. Dec. 461]. He may pull down his own house, though the adjoining house fall for the want of the support which it before had; and he may do it without shoring up the adjoining house—that being the business of the owner: *Peyton v. Mayor and Commonalty of London*, 9 Barn. & Cress. 725. He may pull down his own wall, though the vaults of his neighbor be thereby destroyed: *Chadwick v. Trower*, 6 Bing. N. C. 1. He may build a house and make cellars upon his soil, whereby a house in the adjoining soil falls down: Com. Dig., tit. Action on the Case for Nuisance, C. He may dig in his own land, though the house which his neighbor has previously erected at the extremity of his land be thereby undermined and fall into the pit: 2 Rolle's Abr., tit. Trespass, I, pl. 1; *Wyatt v. Harrison*, 3 Barn. & Adol. 871. In *Panton v. Holland*, 17 Johns. 92 [8 Am. Dec. 369], the defendant, for the purpose of laying the foundation of a house in his own land, dug some distance below the foundation of the plaintiff's house in the contiguous lot, whereby the walls of the plaintiff's house were cracked, and the house was otherwise injured; and it was held that no action would lie.

In *Lasala v. Holbrook*, 4 Paige, 169 [25 Am. Dec. 524], the plaintiffs were the owners of a church, built within six feet of the line of their lot, and the defendant, for the purpose of building in his adjoining lot, was sinking the foundation for his building sixteen feet below the natural surface of the ground, and ten feet below the foundation of the church, whereby the foundation of the church was greatly endangered; and yet, an injunction to restrain the excavation, which had been granted by a master, was dissolved by the chancellor, on the ground 'hat the defendant was exercising a lawful right. In *Thurston v. Hancock*, 12 Mass. 220 [7 Am. Dec. 57], the plaintiff had built a valuable house on Beacon hill, in the city of Boston, one side of the house being within two feet of the side of his land, and had taken the precaution to sink his foundation fifteen feet below the ancient surface of the ground. Seven years afterwards the defendant commenced digging and carrying away the earth from his adjoining land, and dug to the depth of from thirty to forty feet below the natural surface of the ground; by reason of which the foundation of the plaintiff's house was rendered insecure, and he was obliged to take the house down. And yet, it was held that no action lay for the injury to the house. In *Dodd v. Holme*, 1 Ad. & El. 498, the defendant was held liable on the ground that the injury complained of was occasioned by his negligence.

It is proper here to notice a distinction which is stated by Rolle in his Abridgment, at the place already cited. He first gives the judgment of the court in *Wilde v. Minsterley*, 2 Rolle's Abr. 565, pl. 10, to the effect that if A erect a house on the confines of his land next adjoining the land of B, and B afterwards digs his land so near the foundation of A's house (but on no part of his land) that thereby the foundation, and the house itself fall into the pit, yet no action lies by A against B, because it was A's own fault that he built his house so near to B's land; for he, by his act, cannot hinder B from making the best use of his own land that he can. Rolle then adds: "But it seems that a man who has land next adjoining my land cannot dig his land so near mine that thereby my land shall go into the pit; and, therefore, if an action had been brought for that it would lie." This distinction is noticed and approved in *Thurston v. Hancock*, 12 Mass. 220 [7 Am. Dec. 257]; and it was also noticed by Lord Tenterden, in *Wyatt v. Harrison*, 3 Barn. & Adol. 871, but without expressing any opinion on the point. The *dictum* of Rolle was not mentioned in *Panton v. Holland*, 17

Johns. 92 [2 Am. Dec. 369], although his Abridgment was cited at the page in question. But in *Lasala v. Holbrook*, 4 Paige, 169 [25 Am. Dec. 524], the *dictum* was mentioned and approved by the chancellor. He admits and decides that I cannot, by erecting a building near the extremity of my own land, deprive the adjoining owner of the right of digging in his own soil for a legitimate purpose, even though my house be thereby ruined. But he says: "I have a natural right to the use of my land, in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots; and the owners of those lots will not be permitted to destroy my land by removing this natural support or barrier." Although this was not the point in judgment, the opinion of the chancellor is entitled to great weight; and the reasoning is not without some force, that so long as my land remains in its natural state, I ought not to be deprived of the use of it in that state, by any act of my neighbor, though done in his own soil. But still I think the reasoning unsound—especially in reference to property in cities and large towns. If the doctrine were carried out to its legitimate consequences, it would often deprive men of the whole beneficial use of their property. An unimproved lot of land in the city of Brooklyn would be worth little or nothing to the owner, unless he were allowed to dig in it for the purpose of building; and if he may not dig because it will remove the natural support of his neighbor's soil, he has but a nominal right to his property, which can only be made good by negotiation and compact with his neighbor. A city could never be built under such a doctrine. I think the law has superseded the necessity for negotiation, by giving every man such a title to his own land that he may use it for all the purposes to which such lands are usually applied, without being answerable for consequences; provided he exercise proper care and skill to prevent any unnecessary injury to the adjoining land-owner. The saying of Rolle may have been a wise one in his day, but it is not well adapted to our times.

The case before us seems to fall within the principle that a man may enjoy his land in the way such property is usually enjoyed, without being answerable for the indirect or consequential damages which may be sustained by an adjoining land-owner. But if that be a doubtful position, there is a class of cases directly on the point in judgment, which hold that persons acting under an authority conferred by the legislature to grade, level, and improve streets and highways, if they exercise proper care and skill, are not answerable for the

consequential damages which may be sustained by those who own lands bounded by the street or highway. And this is so whether the damage results either from cutting down or raising the street; and although the grade of the street had been before established, and the adjoining land-owners had erected buildings with reference to such grade. As this doctrine has often been asserted, and has never been denied in any well-considered judgment, I shall do little more than refer to some of the cases where it may be found: *Governor etc. of the Cast Plate Manufacturers v. Meredith*, 4 T. R. 794; *Boulton v. Crowther*, 2 Barn. & Cress. 703; *Graves v. Otis*, 2 Hill (N. Y.), 466; *Wilson v. Mayor etc. of New York*, 1 Denio, 595 [43 Am. Dec. 719]; *Benedict v. Goit*, 8 Barb. 459; *Green v. Borough of Reading*, 9 Watts, 382 [36 Am. Dec. 127]; *Henry v. Pittsburgh & Allegheny Bridge Company*, 8 Watts & S. 85; *Goszler v. Corporation of Georgetown*, 6 Wheat. 593; *Matter of Furman Street*, 17 Wend. 667. If the case of *Leader v. Moxton*, 3 Wils. 461, and S. C., 2 W. Black. 924, must be regarded as laying down a different doctrine, it cannot be supported. But the decision seems to have gone on other grounds, and such as are quite consistent with the current of authority on this subject. According to the report in *Wilson*, Gould, J., spoke of the paving commissioners as having misdeemeaned themselves in their trust; and *Blackstone, J.*, said they had acted "arbitrarily and tyrannically;" and according to the report in *Blackstone*, the whole court held "that the commissioners had grossly exceeded their powers." They were of course answerable to those who had been injured. In *Goodloe v. City of Cincinnati*, 4 Ohio, 500 [22 Am. Dec. 764], the declaration, to which there was a demurrer, charged that the defendants "maliciously and without cause" dug up and destroyed the street, to the plaintiff's injury; and the principal question seems to have been whether the corporation, or those who acted under its authority in doing the work, should answer for the wrong. The court said: "When a corporation acts illegally and maliciously, we conceive that it ought to be made directly responsible." That is far enough from proving anything against those who have acted legally and without malice. If the case of *McCombs v. Town Council of Akron*, 15 Ohio, 474, to which we are referred, goes on the ground that the corporation, though it had ample authority to grade the street, did it in an illegal and improper manner, and thereby caused an injury to the plaintiff's property, the decision is well enough. But if the doctrine of the

case be, that the corporation was answerable because it was a corporation, and when a natural person acting under the like authority would not have been liable (see dissenting opinion of Birchard, J.), the decision is entitled to no respect whatever. If the court intended to hold that persons, whether artificial or natural, were answerable for the damages which might result to an adjoining land-owner from the grading of a street, though the act was done under ample authority and in a proper manner, the case is in conflict with many decisions, and cannot be law beyond the state of Ohio. The case of *Rhodes v. City of Cleveland*, 10 Ohio, 159 [36 Am. Dec. 82], calls for no additional remark.

The case of *Fletcher v. Auburn and Syracuse R. R. Co.*, 25 Wend. 462, stands on the somewhat questionable ground, that the legislature did nothing more than to shield the railroad company from an indictment for the wrong which would otherwise have been done to the public by occupying the highway with their road, without giving the company any authority whatever, so far as related to the rights or property of individuals. If the statute under which the defendants acted is constitutional, it is settled that they are not answerable to third persons, whatever damage they may have suffered. Indeed, it is absurd to say that public officers may be liable to an action for what they have done under lawful authority and in a proper manner. Private property cannot be taken for public use without making just compensation to the owner; and a law which authorizes the taking without providing for compensation must be unconstitutional and void. But laws which authorize the opening and improving of streets and highways, or the construction of other works of a public nature, have never been held void because they omitted to provide compensation for those who, though their property was not taken, suffered indirect or consequential damages. The loss which they sustain has always been regarded as *damnum absque injuria*. The question was considered in *Callender v. Marsh*, 1 Pick. 430, and although that case and the case of *Thurston v. Hancock*, 12 Mass. 220 [7 Am. Dec. 57], have to some extent been questioned in a dissenting opinion of Mr. Justice Story, in the case of *Charles River Bridge v. Warren Bridge*, 11 Pet. 638, and by Chancellor Kent, 2 Kent's Com., 6th ed., 340, note, I think the constitution does not apply where the damages are merely consequential. Our general highway laws have never provided for the payment of such damages; and such also is, I believe, the fact in all the

numerous cases where cities and villages in this state have been authorized to open and improve streets and highways. Such laws have never been thought unconstitutional; and no one can calculate the mischiefs which would ensue should we now declare them void. There are many other laws which present the same general question; but it will be enough to refer to one or two by way of illustration. The Albany basin worked a serious injury to the owners of docks on the west side of the river, and yet, as the damage was not direct, but only consequential, the law which authorized the erection of the basin was held constitutional, although it did not provide for compensation to the dock-owners: *Lansing v. Smith*, 8 Cow. 146. This judgment was affirmed by the court of errors: *Lansing v. Smith*, 4 Wend. 9 [21 Am. Dec. 89]. And a law which authorizes a new bridge near to and on the same line of travel with an existing toll-bridge, and which in its consequences destroys the whole value of the old franchise, is constitutional, although it makes no provision for paying damages to the owners of the old bridge: *Charles River Bridge v. Warren Bridge*, 11 Pet. 420. Other illustrations might be added, but they cannot be necessary.

If any one will take the trouble to reflect, he will find it a very common case, that the property of individuals suffers an indirect injury from the constructing of public works; and yet I find but a single instance of providing for the payment of damages in such a case: *Brown v. City of Lowell*, 8 Met. 172. The opening of a new thoroughfare may often result in advancing the interest of one man or a class of men, and even one town, at the expense of another. The construction of the Erie canal destroyed the business of hundreds of tavern-keepers and common carriers between Albany and Buffalo, and greatly depreciated the value of their property, and yet they got no compensation. And new villages sprung up on the line of the canal, at the expense of old ones on the former line of travel and transportation. Railroads destroy the business of stage proprietors, and yet no one has ever thought a railroad charter unconstitutional because it gave no damages to stage-owners. The Hudson river railroad will soon drive many fine steamboats from the river; but no one will think the charter void because it does not provide for the payment of damages to the boat-owners. A fort, jail, workshop, fever hospital, or lunatic asylum, erected by the government, may have the effect of reducing the value of a dwelling-house in the immediate neighborhood; and yet no provision for compensating the owner of

the house has ever been made in such a case. Many other illustrations might be mentioned, but it cannot be necessary to enlarge.

The opening of a street in a city is not necessarily an injury to the adjoining land-owners. On the contrary it is in almost every instance a benefit to them. The damage which they sometimes sustain, because the level of the street does not correspond with the level of their land, is usually more than compensated by the increased value which the property acquires from having a new front on a street. In some instances, the land-owner will suffer a heavy loss; and this case may perhaps be one of the number; but it is *damnum absque injuria*, and the owner must bear it. He often gets the benefit for nothing, when the value of his land is increased by opening or improving a street or highway; and he must bear the burden in the less common case of a depreciation in value in consequence of the work. It may be added that when men buy and build in cities and villages, they usually take into consideration all those things which are likely to affect the value of their property, and particularly what will probably be done by way of opening and grading streets and avenues.

Whether in cases of this kind the legislature ought, as a matter of equity, to provide for the payment of such damages as are merely consequential, we are not called upon to decide. It is enough for us to say that a law which makes no such provision is not, for that reason, unconstitutional and void.

I am of opinion that the judgment of the supreme court is right and should be affirmed.

Judgment affirmed.

CONSEQUENTIAL INJURIES THROUGH WORK AUTHORIZED BY LAW.—An adjacent owner whose lands are not actually taken cannot in the absence of a provision in the charter or statute, recover for consequential injuries sustained by the prosecution of authorized improvements by municipal corporations, or other corporations or individuals acting under legislative authority, when reasonable care and skill in carrying on such work is used; nor can such work be restrained: See *Keasy v. City of Louisville*, 29 Am. Dec. 395; *Hollister v. Union Company*, 25 Id. 36; *Hickox v. City of Cleveland*, 32 Id. 730; *Humes v. Mayor of Knoxville*, 34 Id. 657; *Green v. Borough of Reading*, 36 Id. 127; *Mayor of Philadelphia v. Randolph*, 39 Id. 102; *Wilson v. Mayor etc. of New York*, 43 Id. 719; *Commissioners of Kensington v. Wood*, 49 Id. 582; *Meares v. Commissioners of Wilmington*, Id. 412, and the notes thereto; but see *Rhodes v. City of Cincinnati*, 36 Id. 82; *Town Council of Akron v. McComb*, 51 Id. 453, and notes thereto. The principal case has been much cited as substantiating the foregoing rule: *Selden v. Delaware & H. Canal Co.*, 29 N. Y. 642; *Coster v. Mayor etc. of Albany*, 43 Id. 415; *Brooklyn Park Commissioners v. Armstrong*, 45 Id. 245; *People v. Berberich*, 20 Barb. 231; S. C.,

11 How. Pr. 350; 2 Park. Cr. 371; *Wynehamer v. People*, 13 N. Y. 401; S. C., 12 How. Pr. 259; 2 Park. Cr. 464; *Ely v. Rochester*, 26 Barb. 137; *Swett v. Troy*, 12 Abb. Pr., N. S., 103; S. C., 62 Barb. 632; *Burnet v. Bagg*, 67 Id. 158, note; *Heiser v. Mayor etc. of New York*, 29 Hun, 449; *People v. Green*, 3 Id. 759; S. C., 6 Thomp. & C. 132; *People v. Board of Assessors*, 58 How. Pr. 528; *People v. Mayor etc. of Albany*, 5 Lana. 530; *Smith v. City Council*, 83 Gratt. 212; *Shaw v. Crocker*, 42 Cal. 438; *Creanor v. Nelson*, 23 Id. 467; *Pontiac v. Carter*, 32 Mich. 166; *Harrison v. Board of Supervisors*, 51 Wis. 663; *Rutz v. St. Louis*, 7 Fed. Rep. 439. The rule finds its most frequent and important application in changing grades, and otherwise improving streets. It has been extended and is often applied in the construction of railroads by authority, particularly in streets: See *Lexington & Ohio R. R. v. Applegate*, 33 Am. Dec. 497, and note thereto; and the following cases, in all of which the principal case is cited: *Chapman v. Albany & S. R. R.*, 10 Barb. 366, 368; *Williams v. New York Cent. R. R.*, 18 Id. 247; *Gould v. Hudson River R. R.*, 12 Id. 631; 6 N. Y. 112; *Corry v. Buffalo etc. R. R.*, 23 Barb. 489; *Matter of Utica R. R.*, 56 Id. 460; *Matter of Prospect Park etc. R. R.*, 13 Hun, 347; *Matter of New York Cent. etc. R. R.*, 15 Id. 66; *Matter of New York etc. R'y*, 29 Id. 648; *Story v. New York Elevated R. R.*, 3 Abb. N. C. 505; *Sixth Ave. R. R. v. Gilbert Elevated R'y*, Id. 399; S. C., 11 Jones & S. 318; *Davis v. Mayor etc. of New York*, 14 N. Y. 522; *Bellanger v. New York Cent. R. R.*, 23 Id. 48; *Carson v. Central R. R.*, 35 Cal. 333; *Reynolds v. Mayor etc. of Shreveport*, 13 La. Ann. 427. And the constitutional right to compensation for private property taken for public use does not extend to instances where land is not actually taken, but only indirectly or consequentially injured; and an act authorizing the construction of a railroad or other work of a public nature is not unconstitutional because it does not provide for compensation for such injuries: *Case of Philadelphia & Trenton R. R.*, 36 Am. Dec. 202, and note; *Hollister v. Union Company*, 25 Id. 36; and see *Hooker v. New Haven etc. Co.*, 36 Id. 477, and note. The principal case is an authority on this proposition in *Barnes v. South Side R. R.*, 2 Abb. Pr., N. S., 418; *People v. Kerr*, 37 Barb. 414, 418; *Arnold v. Hudson River R. R.*, 49 Id. 121; *Story v. New York Elevated R. R.*, 90 N. Y. 185, per Earl, J., dissenting.

But if the acts are done in a negligent and careless manner, or are malicious or illegal, and injury results, damages may be recovered: *Goodloe v. City of Cincinnati*, 22 Am. Dec. 764; *Bailey v. Mayor etc. of New York*, 38 Id. 669; *Ross v. City of Madison*, 48 Id. 361; *Meares v. Commissioners of Wilmington*, 49 Id. 412; *Commissioners of Kensington v. Wood*, Id. 582, and notes thereto; *Cotes v. City of Davenport*, 9 Iowa, 236, 237, citing the principal case; thus where the defendants, in constructing a sewer which intersected a natural stream running through plaintiff's land, neglected to provide egress for the stream, by reason of which the water was dammed back, causing injury to the plaintiff's premises, the defendants were liable: *Donohoe v. Mayor of New York*, 3 Daly, 67, 69, distinguishing the principal case, in that in the latter the work was properly done, and without negligence, and the injuries were incidental; and see further, on the liability of municipal corporations for injuries from the improper, negligent, or wrongful exercise of its legitimate powers, *Lacour v. Mayor etc. of New York*, 3 Luer, 414, citing the principal case. It was said in *Clemence v. Auburn*, 66 N. Y. 339, citing the principal case, that the cases holding that individuals are not entitled to compensation for incidental and consequential damages to property resulting from public works constructed under authority of law were not necessarily decisive of the question whether the absolute duty being imposed by law upon a city

to construct and keep in repair sidewalks, the city would not be liable to any one travelling thereon for injuries resulting from an improper construction of the walks.

The payment of damages for consequential injuries may be imposed by charter or statute: See *Monongahela Navigation Co. v. Coon*, 47 Am. Dec. 474; *Parker v. Boston etc. R. R.*, 50 Id. 709, and notes thereto. Other damages than the taking of property may be given under an act providing for certain improvements, the legislature evidently so intending by the using of the words "any damage" and "any claim:" *Ooster v. Mayor etc. of Albany*, 52 Barb. 281, distinguishing the principal case, in that in the latter the law made no provision for the payment of consequential damages.

If, too, the injuries be something more than consequential, damages may be recovered; thus in *St. Peter v. Denison*, 58 N. Y. 423, where the defendant, a contractor, in enlarging and improving a canal, set off a blast, from which came stones and earth fell upon the plaintiff, who was working upon adjoining premises, it was held that the defendant was liable for invading the premises, whether or not he made his invasion without negligence, distinguishing the principal case, in that in the latter the effects complained of were not the immediate and direct results of the acts complained of; and see *Hay v. Cohoes Company*, 51 Am. Dec. 279; *Tremain v. Cohoes Company*, Id. 284; and *McCafferty v. Spuyten Duyvil etc. R. R.*, 61 N. Y. 200, per Dwight, C., dissenting, where blasting was done; and *Byrnes v. Cohoes*, 5 Hun, 604; *Donohoe v. Mayor of New York*, 3 Daly, 67, 69; *Brown v. Cayuga & S. R. R.*, 12 N. Y. 492, cases of injuries caused by overflowing, all citing the principal case; and see also *Ten Eyck v. Delaware etc. Canal Co.*, 37 Am. Dec. 233.

INJURIES TO ANOTHER'S PROPERTY THROUGH USE OF ONE'S OWN.—1. The Right of Lateral Support.—If one dig upon his own land, and thereby injure the buildings of his neighbor upon adjoining premises, he is not liable, in the absence of reasonable care and skill: *Thurston v. Hancock*, 7 Am. Dec. 57, and note; *Panton v. Holland*, 8 Id. 369; *Lasala v. Holbrook*, 25 Id. 524; *Shriens v. Stokes*, 48 Id. 401. The principal case was cited in *Williams v. Kenney*, 14 Barb. 631, as reviewing and reaffirming the whole doctrine as to the extent to which one may use his own property without being liable for damages, in holding that where the defendant owned the soil of a highway, and sold a bank of sand in the same, in front of plaintiff's premises, to a third person, who in taking away the sand, dug down several feet below the surface, and the earth partially caved in to within a few feet of the plaintiff's fence, but none of plaintiff's earth, or fences, or improvements had been the least disturbed, no action will lie for damages. But a man is liable for want of ordinary care and skill: *People v. Canal Board*, 2 Thomp. & C. 279. And an excavation cannot be conducted so heedlessly by one as to unnecessarily injure one's neighbor: *Walter v. Post*, 4 Abb. Pr. 392; S. C., 6 Duer, 374; nor can one, in digging on his own soil, actually and violently blast out the rocks in his neighbor's adjoining lot: *Gourdier v. Cormack*, 2 E. D. Smith, 202, all citing the principal case. In regard to the question, however, whether in so excavating on his own lot a man can injure the soil of an adjoining proprietor in its natural state, there has been some difference of judicial opinion. The doctrine as laid down in *Lasala v. Holbrook*, 25 Am. Dec. 524, that the owner of land has a natural right to the use of it in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots, was not approved in the principal case; and in *Nevins v. Peoria*, 41 Ill. 509, it was said, citing the principal case, among others, that whether a man has a right to excavate in such manner as to cause the soil itself to fall from

my lot into his, was a question upon which the authorities were not agreed. The *dictum* of Bronson, C. J., in the principal case, against the right to have the soil in its natural state supported by surrounding soil, it must be conceded has not met with universal favor; thus it was cited in *Quincy v. Jones*, 76 Ill. 239, as being the extreme view; and in *Farrand v. Marshall*, 19 Barb. 383, 384, it was said that the principal case did not require any judgment upon the question how far the owner of ground adjacent to land owned by another may remove the earth, and thus withdraw the natural support of his neighbor's soil, without being liable for the injury; great stress, however, was put upon the word "usually," as used in the principal case; thus "a man may injure his property in the way such property is usually enjoyed;" and that therefore where an excavation was made to the depth of fifty feet, and the earth removed for the purpose of making brick, thereby endangering the plaintiff's soil and fences on an adjoining lot, such land was not used for the purpose to which such land is "usually applied;" the defendant was consequently restrained from removing any soil which should cause the plaintiff's land to fall away or subside; and see S. C., 21 Id. 414, 415. Again, in *Rychman v. Gills*, 57 N. Y. 77, it was said, per Johnson, C., dissenting, that the rule where the lands of two owners adjoin upon the surface, each owner has a right that his land shall not be deprived of the support of the adjoining land in its natural condition, has become firmly settled, and seems not to have been denied by any reported judgment, notwithstanding apparently questioned in the principal case, where the point was not in issue; and see *Bellows v. Sackett*, 15 Barb. 101; *Foley v. Wyeth*, 2 Allen, 183, both citing the principal case.

2. *Miscellaneous Cases.*—The principal case has been cited in the following miscellaneous instances in regard to the use of one's property: An underground source of a spring, supplying a small stream flowing through adjoining land, may be intercepted by the owner of a farm by digging a ditch to drain his land, or by opening and working a quarry thereon, without being subjected to damages: *Ellis v. Duncan*, 11 How. Pr. 517; S. C., 21 Barb. 235; but not if the act cutting off the supply of the spring or well is wanton or malicious, without any purpose of usefulness: *Trustees v. Youmans*, 50 Barb. 320. If an embankment is erected with due care on a stream to prevent the water when raised by defendant's dam from overflowing the lands of adjacent owners, the injury caused to the latter by percolation, in consequence thereof, is *damnum absque injuria*: *Pixley v. Clark*, 32 Id. 274. But this was reversed in *Pixley v. Clark*, 35 N. Y. 522, the court saying that the principal case "and every illustration in it may be assented to without impairing the right to maintain this action." Where, in taking down a house, the plaintiff's adjoining house fell, a holding that plaintiff was bound to support his own house, it not being shown that he was entitled to have it supported by defendants, is analogous to the doctrine that a man may in general do what he will on his own land, so that he do not affect the adjoining premises in their natural state: *Partridge v. Gilbert*, 15 N. Y. 612; and see *Daly v. Grimley*, 49 How. Pr. 521; *Richard v. Scott*, 32 Am. Dec. 779, in regard to the use of a party wall. If a man do an act lawful in itself, in so negligent and unskillful a manner as to cause injury to another, he must answer for the consequences; as where the defendant erected a stack of ovens upon his own premises in such a careless, negligent, and insecure manner that the structure fell upon the house of the adjoining owner: *Seabrook v. Hecker*, 4 Robt. 345; 2 Id. 306, 307. In *Carhart v. Auburn Gas Light Co.*, 22 Barb. 308, 310—an action for polluting a stream—the rule of the principal

case in respect to the use of property was approved; but when property is used so as to create a nuisance, the rule terminates, and the principle of the maxim, *Sic utere tuo*, etc., applies: and see also the holding of the learned chief justice who delivered the opinion in the principal case, as to the carrying on of a lawful trade or business in such a manner as to prove a nuisance, in *Fish v. Dodge*, 47 Am. Dec. 254. If one sets fire to his fallow, wood, and timber, for the purpose of bringing his land under cultivation, and the wind rises and causes the flames to spread, and communicate to his neighbor's land, no action will lie without proof of negligence or misconduct: *Stuart v. Hawley*, 22 Barb. 622. But a steamboat company propelling boats on a river must provide all reasonable means, and properly use the same, to protect others' property, and carelessness in either particular, injuring another—for example, setting fire to his grain on the banks from chimneys—will make the company liable: *Gerke v. California Steam Nav. Co.*, 9 Cal. 256; and see, on the liability of railroad companies for fires, *Burroughs v. Housatonic R. R.*, 38 Am. Dec. 64; *Hart v. Western R. R.*, 46 Id. 719, and the notes thereto. Simply turning one's own sheep having an infectious disease into one's own lot, adjoining another's lot occupied by sheep, is not unlawful, nor such an act of wrong or negligence as will give the owner of the adjoining lot a legal cause of action for damage sustained in consequence of the disease being communicated: *Fisher v. Clark*, 41 Barb. 330. And as to injuries caused by the explosion of a steam boiler used on adjoining premises, see *Loose v. Buchanan*, 61 Id. 106, 111; 51 N. Y. 476. The maxim, *So use your own as not to injure another's property*, extends only to legal injuries, and does not condemn the darkening of another's windows, or depriving him of a prospect, by building on one's own land, where no right to light has been acquired by grant or prescription: *Pickard v. Collins*, 23 Barb. 458; and see further, on the obstruction of ancient lights, *Pierre v. Fernald*, 46 Am. Dec. 573, and note.

ENO v. WOODWORTH.

[4 NEW YORK (4 CONSTOCK), 249.]

STIPULATION IN CONTRACT OF SALE OF LAND TO REPAY PURCHASE-MONEY at a specified time, if the vendee desires it, is not void for want of consideration, for the purchase and payment of the price furnish a sufficient consideration.

SUCH STIPULATION IS NOT VOID FOR WANT OF MUTUALITY, even though it does in terms require that the vendee, on demanding repayment of the price, will return the property; a condition to that effect will be implied; or a return may be enforced in equity.

ACTION TO RECOVER MONEY alleged to be due by contract may be sustained under the New York code of procedure, notwithstanding the contract is void, if the facts alleged and proved show an implied obligation resting on the defendant to pay the sum demanded as money received to plaintiff's use.

APPEAL from a judgment for plaintiff in an action on a contract for the payment of money. The contract was between defendant Woodworth and one Bonesteel, and was in writing, signed by both parties. It embodied a sale of lands in Wis-

consin by Woodworth to Bonesteel, and contained the following clause, on which its action was founded: "At the expiration of one year from the date, if the said Bonesteel desires it, on giving to said Woodworth thirty days' notice, the said Woodworth agrees to pay back to said Bonesteel the said sum of three thousand five hundred dollars, and all advances which the said Bonesteel in the mean time may have made on said purchase, together with the interest thereon from the time of each payment." Whatever rights this engagement conferred on Bonesteel became afterwards vested in Eno, the plaintiff, as general assignee of Bonesteel for benefit of creditors. He gave notice to defendant to repay the purchase-money, and on failure of defendant to do so, brought this action. Other facts are stated in the opinion. On the trial, the jury found a special verdict, on which the judge directed judgment to be entered for plaintiff, which judgment the general term affirmed.

E. A. Eldredge, for the appellant.

William Eno, in propria persona.

By Court, BRONSON, C. J. The defendant agreed to sell, and at a future period to convey, certain lands to Bonesteel, the plaintiff's assignor, for the consideration of three thousand five hundred dollars, which Bonesteel paid at the time, fifteen hundred dollars in money, and the residue by his promissory note; and the defendant further agreed, that at the expiration of one year, if Bonesteel should so desire, and give thirty days' notice, he would pay back to Bonesteel the three thousand five hundred dollars with the interest thereon. The defendant did not convey in pursuance of the contract; and the proper notice was given to have the money refunded which Bonesteel had paid. The defendant did not repay, and the plaintiff thereupon brought this action, claiming to recover the fifteen hundred dollars with interest. As Bonesteel had not paid the note, the plaintiff's claim was limited to the sum which has been mentioned. That sum he has recovered, and the recovery seems to be a very proper one.

But it is said that the contract was void for the want of mutuality, and a sufficient consideration. The agreement was signed by both parties, and was equally obligatory upon both. It is true that Bonesteel did not, in terms, engage to do anything on his part; but that was because he performed his part of the contract at the time it was made, by paying the stipulated price of the land, which was all he had to do. And al-

though no consideration for the defendant's promise was expressly mentioned in the writing, it is easy to see that there was a consideration; to wit, the purchase of the land, and the payment of the stipulated price. And this was a good consideration, although Bonesteel had the right to rescind the purchase, and have his money back again, with interest, at the end of a year. In effect, this was an alternative agreement, either to sell and purchase land, or to borrow and lend money, according as Bonesteel should decide at the end of the year. If he gave no notice, it was a sale and purchase of land; and as the price was already paid, there could be no question about a sufficient consideration for the defendant's promise. If Bonesteel gave notice, it was then, in effect, a borrowing and lending of the three thousand five hundred dollars; and clearly, the lending of the money was a sufficient consideration for an agreement to repay it at the end of a year with interest.

It is said that the promise to refund the money was void, because the defendant was to convey the land in less than a year, and there was no stipulation on the part of Bonesteel to reconvey in case he should subsequently elect to have his money back again. It is true that there is no stipulation, in terms, to reconvey in that case, but such an obligation may, I think, be fairly implied from the nature of the transaction. If Bonesteel should give notice at the end of the year, it would be equivalent to saying that he intended to rescind the sale; and he would not be allowed to recover back the money, without reconveying the land. If he could recover in a court of law, it is clear that equity would compel him to reconvey. But I think he would be obliged to do it, before he could recover at law.

In this view of the case, there is no reason why the plaintiff should not recover in an action on the contract, for not paying back the money in pursuance of the agreement.

But let it be granted that the contract was void, not because it was illegal, but for want of mutuality. Then the defendant has got the money of Bonesteel without giving anything in return. He is bound in equity and good conscience to repay it; and I see no reason why it may not be recovered in an action for money had and received to the use of Bonesteel. To this the defendant answers, that this is not an action for money had and received to the use of Bonesteel; but an action upon the written agreement, and must stand or fall with it. It is true that the pleader has stated the written agreement, and all the facts necessary to show a right to recover upon it, if it is

valid. But it is also true that the same facts establish a right to recover back the money, if the agreement is void. This is an action under the code, and the whole case is set forth in the complaint. Upon the case as it is stated in the complaint, and has been found by the jury, the plaintiff is entitled to recover, whether the written contract is good or bad; and the defendant cannot defeat the action by giving it a name, or because the pleadings do not conform to the old precedents. It is questionable whether it would be good pleading under the code to follow the old form, and say that the defendant was indebted to the plaintiff in a certain sum, for so much money had and received by the defendant to the plaintiff's use. The more proper course would seem to be that which the plaintiff has adopted, of stating the facts which show that the defendant has received money which belongs to the plaintiff.

The last objection made to the recovery is, that by failing to pay the two-thousand-dollar note, Bonesteel forfeited all right under the contract; and that the defendant was neither bound to convey nor to refund the money he had received. It is a sufficient answer to this objection that it nowhere appears when the note was payable. It may be that the note was not due until after Bonesteel had given notice for the purpose of rescinding the purchase; and it could not be necessary for Bonesteel to pay money which he had a right to recall the next moment.

I see no error in the judgment, and am of opinion that it should be affirmed.

Judgment affirmed.

MUTUALITY OF CONTRACTS.—An agreement optional as to one party and obligatory as to the other is deemed a mutual contract, and may be enforced by the former: *Cherry v. Smith*, 39 Am. Dec. 150, and note. Where, on a conveyance of land by defendant to plaintiff, the former executed simultaneously therewith an agreement that, at the expiration of a certain time, the land would be worth a certain price per acre, and that he would then purchase it back if the plaintiff desired to sell, held, the contract was valid and binding on defendant, and an action lay to recover the amount stipulated as purchase-money; want of mutuality is no obstacle in the way, where the consideration is sufficient: *Burrell v. Root*, 40 N. Y. 499; but where an option is given to one party, by the terms of a contract, to return certain bonds purchased, and receive the purchase-money with interest, the other party has no right of action to compel a return of the bonds on payment of the purchase-money: *Litchfield v. Irvin*, 51 Id. 58. There is no want of mutuality, however, in the obligations of parties to a contract for apprenticing an infant, where they bound themselves, so far as it was in their power, to see the contract fulfilled: *Van Dorn v. Young*, 13 Barb. 296; all citing or distinguishing the principal case.

MONEY PAID ON CONTRACT MERELY VOID, as distinguished from one illegal, may be recovered back: *Knowlton v. Congress etc. Co.*, 57 N. Y. 542, per Dwight, C., dissenting, citing the principal case; but an action cannot be maintained on an illegal contract, either to enforce it directly or to recover back money paid on it after execution: *Webb v. Fulchre*, 40 Am. Dec. 412, and cases in note.

PLEADING UNDER REFORMED PROCEDURE.—Whether a statement of the cause of action substantially in the form of the common counts in *indebitatus assumpsit* is a proper pleading under the New York code of procedure, was said not to be fully settled in *Hall v. Southmayd*, 15 Barb. 33; and see *Marsh v. Wyckoff*, 10 Bosw. 206; *Blanchard v. Strait*, 8 How. Pr. 86. Under the code, facts and not evidence must be pleaded: *Allen v. Patterson*, 7 N. Y. 478; and facts and not legal inferences: See *White v. Madison*, 26 Id. 126; S. C., 26 How. Pr. 486; *Bushnell v. Chautauqua County Nat. Bank*, 10 Hun, 382. Where a complaint on a promissory note contained an allegation that the plaintiff was the owner and holder of the same, and the answer a denial of ownership, the allegation is a conclusion of law, and the denial raises no material issue: *Wedderspoon v. Rogers*, 32 Cal. 573; *Seeley v. Angell*, 17 Barb. 537. Where the defendant sold to the plaintiff certain bonds, upon an agreement that if the latter got sick of them, he might redeliver them to the defendant, who would return the purchase-money, an action may be maintained on the agreement to recover back the purchase-money: *Wooster v. Sage*, 6 Hun, 288; and see S. C., 67 N. Y. 73; and it is proper to state the facts and circumstances of the case, instead of suing for money had and received: *Id.*, 6 Hun, 288. A good cause of action is not destroyed by adding allegations of immaterial matter: *Union Bank v. Bush*, 36 N. Y. 636. And where facts embraced in pleadings, and proved on the trial, present a fit case for certain specific relief, and as the claim for such relief was distinctly made at the close of the case, and was susceptible of being granted under the allegations in the pleadings and proofs connected therewith, and under a clause for general relief, the decree should have provided for it to the extent claimed: *Beach v. Cooks*, 39 Barb. 367.

GILES v. COMSTOCK.

[4 NEW YORK (4 COMSTOCK), 270.]

AGREEMENT TO PAY RENT IN ADVANCE IS VALID, and will support a distress, or an action if the rent is not paid on the agreed day.

ACTION FOR RENT DUE IS NOT DEFEATED by proof that after the agreed day for payment the premises were sold on foreclosure of mortgage, divesting the landlord's title, and that the tenant attorned and paid rent to the purchaser.

APPEAL from a judgment of the supreme court in favor of defendant, sued for rent. On the trial, the plaintiff proved an appointment as receiver, which authorized him to lease the premises (a store in New York city), and collect the rent; that he let them to defendant, who agreed, by written lease, to pay rent in advance (that is, on the first day of each quarter), and

that the rent for the fourth quarter remained unpaid, though demanded, etc. The tenant then proved that during the quarter a mortgage given by the former owner of whose estate plaintiff was receiver was foreclosed, the premises were sold, and a master's deed was given to the purchaser; also that the tenant had paid the rent for the current quarter to such purchaser, in compliance with a demand from him. Upon these facts, the judge ruled that the receiver could not maintain the action; and the tenant had judgment.

H. S. Dodge, for the appellant, the receiver.

Daniel Lord, for the respondent, the tenant.

By Court, TAYLOR, J. A contract to pay rent in advance is not illegal nor void; but if so made, it may be distrained for, or an action maintained for it in debt or covenant: *Conway v. Starkweather*, 1 Denio, 113; *Russell v. Doty*, 4 Cow. 578. This point has been very fully examined and clearly settled in England, as well as in this country. In *Buckley v. Taylor*, 2 T. R. 600, Buller, J., says: "In general, the landlord cannot distrain till the rent becomes due; but if the agreement be otherwise, I see no objection to it in point of law." In *Harrison v. Barry*, 7 Price, 690, it was adjudged that a claim may be supported for rent stipulated by the lessee to be paid in advance; and such rent may be distrained for by the landlord. Baron Graham there remarked, that as to the objection to forehand rent, he saw no reason why it was not competent to include that in the distress; the anticipation of rent was matter of express stipulation. And it was admitted by the counsel, *arguendo*, that an action of debt or covenant might have been maintained for such rent in advance against the tenant. There can be no doubt but that the right to sue for the rent arose as soon as the covenant was broken by non-payment after rent became due: *Russell v. Doty*, 4 Cow. 578; *Nichols v. Dusenbury*, 2 N. Y. 286; Gilbert on Rent, 25; Wood. Land. & Ten. 238.

The force of this contract of the lessee to pay in advance is sought to be avoided by the previous practice of the parties; which, as appears by the testimony, was not in accordance with the terms of the lease; but the rent had before, in fact, been paid at the end of each quarter, and of course after it had accrued by occupation of the premises. But I apprehend the authorities relied upon do not reach the case before us. In *French v. Carhart*, 1 N. Y. 96, certain often recognized rules of construction were quoted and approved by his honor, Judge

Jewett, and among the rest, that when the words of a grant are ambiguous, the court will call in the aid of the acts done under it, as a clew to the intention of the parties. But the terms of this lease are not at all ambiguous; there is no doubt about their meaning; and it would be adopting an entire new rule to affirm that the specified time of payment of money is not, according to the intention of the parties, whenever the creditor shall not demand, or the debtor shall neglect to pay until some time after payment became due. There is here no room for the operation of any rule of construction which arises out of doubtful or ambiguous terms of a written contract.

The case of *Smith v. Shepard*, 15 Pick. 147 [25 Am. Dec. 432], approaches nearer the one before us, in its circumstances, than any other which I have been able to find. In that case, as in this, the rent was payable in advance. There, however, the mortgagee took possession of the property, after condition broken, for the purpose of foreclosure, as he had a right to do, by force of a statute of that commonwealth, which gave him a lawful possession, and which the court decided operated as an ouster of the tenant. The entry was made by the mortgagee on the first day of the quarter, and the day on which the rent was made payable in advance by the lease. The court decided that under these circumstances the plaintiff could not maintain his action; and Shaw, J., places the decision upon the ground that "as to the quarter's rent due by covenant in advance, the defendant had the whole day to make the payment in advance;" that is, the whole of the first day of the quarter ensuing; "but during the day the mortgagee entered and ousted him, and this was a good excuse." But would it have been a good excuse if the entry of the mortgagee had been delayed until the next day? It is not so decided in that case, but the contrary inference is clearly deducible from the learned judge's remarks. In the present case, therefore, the breach of the covenant for non-payment of rent by the defendant raised a perfect right of action on behalf of the plaintiff.

Beyond all doubt, the foreclosure of the mortgage and the sale and conveyance of the demised premises extinguished the title held by the receiver, and divested him of all right to receive any rent accruing after the current quarter. But it is not so clear that Comstock was justified in attorning to Taylor on the twenty-eighth day of April, on the ground of a rightful eviction. Taylor could claim nothing, and could exercise no ownership over the property except such as he acquired by virtue of the decree and sale. That decree gave Taylor the

possession of the premises on production of the master's deed, and a certified copy of the order to confirm the sale. The deed alone, without the order and before confirmation, was sufficient to sustain a suit in ejectment against a wrong-doer, for if there were any doubt of such a proposition, says Judge Cowen, all question would be removed by the doctrine of relation; the sale and deed being afterwards confirmed, by an order, this related to the date of the deed, thus overreaching the claim of a mere intruder into the premises: *Fuller v. Van Geesen*, 4 Hill, 172. But nowhere do I find that the courts have gone the length of sustaining an eviction of one in rightful possession before the time fixed by the decree for the surrender of possession. The purchaser is not injured by the delay, for he purchased with a full knowledge of the rights of the mortgagor, and those claiming under him, and he has his remedy for the accruing rent.

According to the terms of the decree under which the purchaser claimed, the parties to that foreclosure suit who might be in possession of the premises sold were ordered to deliver possession to the purchaser on production of the master's deed and a certified copy of the order confirming the report of sale after the same should have become absolute. Under this decree, it seems to me that the defendant, being a party to that suit, and representing the owner of the equity of redemption, was entitled to hold possession, until by the terms of the decree he was ordered to surrender it, and although an eviction by process of law is not necessary to justify the attornment of the tenant; yet for his justification he must be able to show that the claimant by paramount title has a legal and equitable right to the possession of the premises *in præsentia*: *Greenvault v. Davis*, 4 Hill, 646, and cases there cited. Strictly speaking, the attornment in this case is not within the exceptions in the statute. The only decree pursuant to which the premises could be supposed to be surrendered did not order possession to be given to the purchaser until some weeks after the termination of the tenancy.

The doctrine everywhere running through the books is that to render eviction from the premises a valid defense, it must have taken place before the rent became due. In *Salmon v. Smith*, 1 Sand. 204, note 2, it is said that to occasion a suspension of the rent there must be an expulsion or eviction of the lessee; and the plea must state his eviction or expulsion and keeping him out of possession until after the rent became due. So in *Page v. Parr*, Sty. 432: "If there be an actual ex-

pulsion of the tenant from the whole or a part, by the lessor, before the rent became due, it bars the claim for rent:" See also *Timbrell v. Bullock*, Id. 446. "If the tenant be evicted from the lands demised to him by a title paramount, before the rent falls due, he will be discharged from the payment of rent:" 2 Rolle's Abr., tit. Rent, 6. And Chancellor Kent affirms the same doctrine, and quotes the above authorities with approbation: 3 Kent's Com. 37. On the other hand, I do not find a single case which conflicts with this doctrine, that to bar the action for rent the eviction must take place before the rent becomes due; and whether it become due by special agreement in advance or without such agreement by the expiration of the term, does not vary the rights of the lessor. The question is, When did the rent become due, and the right of action arise? "And that rent," says Judge Sutherland, *Russell v. Doty*, 4 Cow. 581, "surely must be due for which a landlord has a right to distrain."

Taylor, the purchaser of the mortgaged premises, under the decree of foreclosure, had no right whatever to the rent which had previously accrued, and in *Astor v. Turner*, 11 Paige, 436 [43 Am. Dec. 766], the chancellor seems very clearly to imply, that under a decree like this the purchaser cannot claim the rent until after the order for confirmation. His words were: "The purchaser was not entitled to the rent which would become due before his right to the possession of the premises was to commence. If the purchaser had been entitled to the immediate possession by the terms of the decree and the condition of sale, the rent which fell due the next day would have belonged to him." In that case, the sale was made on the thirty-first of October, and the rent became due the first of November. The rent for the quarter preceding was decided to belong to the owner of the equity of redemption, even if the order to confirm the master's report had been entered immediately.

The judge erred in charging the jury that the title derived to the purchaser under the mortgage foreclosure and master's deed, the entry and demand of rent under that deed as shown in evidence, and the payment to him by the defendant thereupon, were sufficient in law to bar the plaintiff's right of action; and the judgment below must be reversed.

Judgment reversed.

EVICTON WHEN DEFENSE TO CLAIM FOR RENT.—To render an eviction of a tenant a valid defense against the landlord's claim for rent, it must take place before the rent is due. *Vernan v. Smith*, 15 N. Y. 332; *Whitney v. Meyers*,

1 Duer, 276; *Healy v. McManus*, 23 How. Pr. 239; *McKensie v. Farrell*, 4 Bosw. 205; and see *Johnson v. Oppenheim*, 3 Jones & S. 444; *Brooks v. Christopher*, 5 Duer, 217; and where rent is to be paid monthly in advance, and the tenant abandons the premises on the first day of a certain month, acts of the landlord before the expiration of such month, accepting possession, constitute no defense to an action for the month's rent: *MacKellar v. Sigler*, 47 How. Pr. 22, all citing the principal case; but rent payable on a certain day may be paid at any time during that day, and if the tenant is, on that day, evicted under a title paramount, he is not bound to pay such rent: *Smith v. Shepard*, 25 Am. Dec. 432. If a tenant abandons the premises, the landlord may let them lie idle and recover rent for the whole term, or he may put an end to the lease by entry; if he does the latter, he can only recover rent actually due at the time he takes possession: *Schuisler v. Ames*, 50 Id. 168. But the rights of the parties are not affected by a judgment of foreclosure of the leased premises, and the lessor may recover rent due, until by the terms of the decree the purchaser is entitled to possession: *Whalin v. White*, 25 N. Y. 465; *Clason v. Corley*, 5 Sandf. 450; *Peck v. Knickerbocker Ice Co.*, 18 Hun, 186; and see *Ruggles v. First National Bank*, 43 Mich. 201, per Cooley, J., dissenting, all citing the principal case. After a mortgage sale, and before the purchaser is entitled to a deed, the rents, if the sale has paid the debt, belong to the owner of the equity of redemption, but if there is a deficiency, the mortgagee is entitled to have such rents applied to the payment thereof: *Astor v. Turner*, 43 Am. Dec. 766.

MISCELLANEOUS CITATIONS OF PRINCIPAL CASE.—In *Moffatt v. Strong*, 9 Bosw. 69, to the point that where the landlord's title has expired, this will be a defense to the tenant in an action for rent; and in *Hardy v. Aberly*, 57 Barb. 154, to the point that it may well be doubted whether a tenant can defend for rent under a paramount title without divesting himself of the possession acquired from his landlord; and see, on this last proposition, *George v. Putney*, 50 Am. Dec. 788, and cases in note.

CLARK v. MAYOR ETC. OF NEW YORK CITY.

[4 NEW YORK (4 COMSTOCK), 333.]

CONTRACTOR PREVENTED FROM COMPLETING CONTRACT BY EMPLOYING PARTY may either bring an action for a breach of the contract and recover as damages the loss of profits sustained by the breach, or he may waive the contract and sue for work and labor generally, and recover the actual value of the work done.

CONTRACTOR SUEING FOR WORK AND LABOR GENERALLY, when wrongfully prevented from completing the contract, cannot recover speculative profits, or refer to the contract as furnishing a rule for computing the sum due him, but is confined to the actual value of the work and materials supplied.

APPEAL from a judgment of the supreme court. The action was *assumpsit* for work done and materials furnished in constructing a section of the Croton aqueduct, for the corporation of the city of New York, but under a contract executed by the water commissioners. The declaration contained a count upon the contract, and one for the value of the work done and ma-

terials supplied. The cause was referred for trial. The report of the referees, though confusedly expressed, embodied the following facts: That the price of rock excavation was fixed by the contract at one dollar per yard; that the contractors had been stopped by the city authorities in the performance of the work; that on comparing the quantity of rock which the contractors had excavated when they were stopped with that not then excavated (which the referees considered a just rule of computing the contractors' damages), the value of the work done appeared to be forty-six thousand eight hundred dollars; and this sum the referees reported as due. A majority of the supreme court held, in an opinion not reported, that the contract, though made with the water commissioners, was binding on the city (under the decisions in *Bailey v. Mayor etc. of New York*, 38 Am. Dec. 669; *Mayor etc. of New York v. Bailey*, 2 Denio, 433; *Appleton v. Water Commissioners*, 2 Hill (N. Y.), 432), and was admissible in evidence; that upon the facts proved the city must be deemed to have rescinded it, leaving the contractors at liberty to sue on a *quantum meruit*; and that the principle adopted by the referees for computing the value was proper. Judgment was therefore rendered for the contractors.

James T. Brady, for the appellant, the city.

Samuel Sherwood, for the respondents, the contractors.

By Court, PRATT, J. The counsel for the plaintiffs abandoned upon the argument all claim to recover upon the special count, and conceded that they must recover, if at all, upon the common count for a *quantum meruit*. Upon this count, therefore, two questions arise in the case, the first upon the right to recover, and the second upon the rule adopted for the assessment of damages.

Much of the apparent difficulty in this case results from the obscure manner in which the facts are stated in the special report. It is not easy to ascertain from the report the grounds upon which the plaintiffs' right to recover was placed in the court below, nor the rule adopted in assessing the damages.

The original contract with the water commissioners, if that should be allowed to have any influence in the case, gave them the right at any time to change the form, or dimensions, or materials of the work. It is clear, under this provision, that the commissioners were authorized to make any change in the dimensions of the work which they might deem proper, although by such change the excavation of rock or other materials might be very materially reduced from the original estimate.

Nor would the contractors be entitled to additional compensation, although such change might have the effect to deprive them of the privilege of doing the easiest, and therefore the most profitable, part of the work. They took upon themselves this hazard by the terms of their contract.

But this provision, although it gave the commissioners power to direct in good faith any change in the form or dimensions of the work, did not authorize them to stop the work in an unfinished state, and thus arbitrarily annul the contract. And this was a question for the referees to determine, whether the commissioners simply varied the form or construction of the reservoir so as to make a less amount of excavation sufficient, or put an entire stop to the work, leaving the reservoir unfinished. Nothing but the conclusions of the referees is given in the report of facts, and if I understand the language of the report, the referees found in favor of the latter proposition. It is that "they have ascertained from the proof that the plaintiffs have been stopped by the defendants in the performance of the entire work." I infer from this that the defendants stopped the work before the job had been completed, and not that they concluded to change its form or dimensions so that less work was required than the original estimate contemplated. Whether the evidence before the referees was sufficient to sustain this finding we have no means of ascertaining. If it was not sufficient, the error cannot be corrected in this court, but it should have been corrected in the court where the action was pending.

On the question of damages, the special report is more obscure, if possible, than upon the question just considered. It is clear that, under the common counts, the plaintiffs cannot recover the same amount of damages which they might be entitled to recover in an action for a breach of the special contract. They must be confined, in this action, either to the price of the work stipulated in the contract, or the actual worth of the work done. When parties deviate from the terms of a special contract, the contract price will, so far as applicable, generally be the rule of damages.

But when the contract is terminated by one party against the consent of the other, the latter will not be confined to the contract price, but may bring his action for a breach of the contract and recover as damages all that he may lose by way of profits in not being allowed to fulfill the contract; or he may waive the contract and bring his action on the common counts for work and labor generally, and recover what the work done

is actually worth. But in the latter case he will not be allowed to recover as damages anything for speculative profits, but the actual value of the work and materials must be the rule of damages. He cannot assume the contract price as the true value of the work necessary to complete the whole job, and then recover the proportion which the work done will bear to the whole job, although it may amount to more than either the contract price or the actual value. This would be allowing indirectly a recovery for speculative profits upon the common counts. If the party seeks to recover more than the actual worth of his work, in a case where he has been prevented from performing the entire contract, he must resort to his action directly upon the contract; but when he elects to consider the contract rescinded, and goes upon the *quantum meruit*, the actual value is the rule of damages. The injustice of any other rule is very apparent in this case. Several different kinds of work are specified in the contract, and a specific price per yard attached to each. The plaintiffs have selected the rock excavation from the different kinds of work specified, and proved that the part performed was worth some three times as much per yard as the part remaining unperformed, and have recovered accordingly; although had all the different kinds of work specified in the contract been taken into consideration, it is quite probable that upon a general average of the work the part performed would be found no more difficult than that remaining unperformed. It is at all events quite clear that justice could not be done without an investigation of all the different kinds of work specified. The contract is entire, and if it be resorted to at all as regulating the damages, it should only be resorted to in connection with all the kinds of work specified therein.

This question then arises, What rule did the referees in fact adopt? The special report, in giving their final conclusion, says: "The price of the rock excavation was fixed at one dollar per yard, which they have been governed by, taking the whole quantity originally required to be excavated; that they have ascertained the relative value of the whole quantity excavated and of the quantity remaining not excavated; and comparing such relative value, they find there is due from the defendants to the plaintiffs, for the portion excavated, the sum of forty-six thousand eight hundred dollars." Although this is anything but a lucid statement, yet if it means anything it must mean that the referees neither allowed the actual value of the work performed, nor the price per yard

stipulated in the contract; but assuming the estimated quantity as the whole rock excavation, they ascertained its aggregate value at one dollar per yard. They then assumed that the part performed was worth some three times as much per yard as that remaining unperformed, and assessed the damages accordingly, assuming the average value of the whole work at one dollar per yard, making an aggregate of one hundred and fifty thousand dollars. By this means, it will be noticed that the plaintiffs were enabled to recover for some sixty-six thousand cubic square yards of excavation nearly one hundred and thirteen thousand dollars, a much greater sum than the cubic yards actually excavated would amount to, either at one dollar per yard or at the price per yard which the excavation was proved to be worth. At the former price, the plaintiffs had received the whole amount due, into some three thousand four hundred and eighty-three dollars and forty-nine cents, which was conceded to be due; and at the highest prices proved for the work done, there would remain due some thirty-four thousand and eighty-eight dollars, a sum much less than the amount found due by the referees.

It is clear, therefore, whether I am right or wrong in the interpretation which I have given their report, that an error has been committed by the referees, for which the judgment of the supreme court should be reversed and a new trial ordered.

Judgment reversed.

DAMAGES WHERE COMPLETION OF CONTRACT PREVENTED BY EMPLOYER: See *Masterton v. Mayor etc. of Brooklyn*, 42 Am. Dec. 38, and note. A party who has been wrongfully deprived of the gains and profits of an executory contract, for work and labor and materials, and the like, may recover as damages, in an action on the contract, the difference between the contract price and the amount it would have cost him to perform the contract: *Devlin v. Mayor etc. of New York*, 63 N. Y. 25; S. C., 50 How. Pr. 18; *Dillon v. Anderson*, 43 Id. 237; *Hale v. Trout*, 35 Cal. 242, 245. But if the contract be waived and an action brought for work and labor and materials, loss of profits cannot be recovered, but only the fair value of the work performed and materials furnished up to the time of prevention: *Moran v. McSwegan*, 1 Jones & S. 352; *Doughty v. O'Donnell*, 4 Daly, 61, all citing the principal case. An extended criticism on the principal case will be found in *Doolittle v. McCullough*, 12 Ohio St. 369-372, the court there coming to the conclusion that they are not "aware of any authority for the opinion so expressed by the judge in the case of *Clark v. Mayor*, that 'when the contract is terminated by one party against the consent of the other, the latter will not be confined to the contract price,' " and that if he bring his action on the common counts for work and labor, he may "recover what the work done is actually worth;" and that "the actual value of the work and materials must be the rule of damages." The court then hold that in *assumpsit* for work and labor, the contract was *prima facie* the measure of damages.

MISCELLANEOUS CITATIONS OF PRINCIPAL CASE.—Cited in *Kingsley v. Brooklyn*, 5 Abb. N. C. 30, to the point that in an authorized express contract by a municipal corporation, a reservation of power to make changes in detail, and fix the prices of extra work, is valid, and such agreements are not regarded with disfavor; distinguished in *Van Valkenburgh v. Mayor etc. of New York*, 43 Barb. 114; S. C., 28 How. Pr. 240, in considering the liability of the defendants for the acts of a commission, constituted by an act of the legislature to locate and erect a court-house in the city of New York, with power to purchase the necessary grounds for that purpose, declaring that the grounds and buildings so purchased and erected should be the property of the city, in that in the principal case the question of defendant's liability for work done under a contract with the Croton water commissioners was not noticed, but that the judgment was reversed for errors on the trial.

MUNGER v. TONAWANDA RAILROAD COMPANY.

[4 NEW YORK (4 CONSTOCK), 342.]

RAILROAD COMPANY IS TO BE DEEMED OWNER, for the time being, of lands which it has lawfully acquired for a road-bed, in such sense that animals which stray upon the track are trespassers.

NEGLECT CONTRIBUTING TO LOSS is imputed by law to the owner of animals which escape from his inclosure and stray upon a railroad track, where they are run over; and evidence that his fences were good, or that the animals were quiet and orderly, will not enable him to recover from the company for the accidental or careless killing of them.

APPEAL from a judgment of the supreme court. The action is the same as that reported in 49 Am. Dec. 239, but now came up after a second trial. It was brought to recover damages for the killing of oxen belonging to plaintiff, which had strayed upon the track of defendants' railroad and were run over by a passing train. There was no averment or proof that they were willfully or maliciously killed, but the plaintiff, on the trial, offered evidence that the pasture in which he had placed the beasts was well fenced, etc., and that they were quiet and orderly; also that the persons in charge of the train were negligent; both which offers were excluded, and the plaintiff was nonsuited, which ruling the general term sustained.

J. C. Cochrane, for the appellants.

J. B. Bennett, for the respondent.

By Court, HURLBUT, J. It was competent for the Tonawanda Railroad Company, by voluntary cession or by appropriation, to acquire the title to lands which they were authorized to use for the purpose of constructing a railway and maintaining the same during the existence of their charter: Laws of 1832, p. 427. The declaration assumes that the company owned and were possessed of the land occupied by their

railway, and the chief ground of complaint is, that the plaintiff's cattle, having strayed thereon, were destroyed by the carelessness and negligence of the company in propelling their engine and cars. It is immaterial whether or not the company were entitled to the site of their railway in fee-simple. They had a clear right to the exclusive use of the land while it was necessary for the enjoyment of their chartered privileges; and at any rate, the plaintiff was not in a condition to show that he owned the land where the oxen were killed, because every count in his declaration was framed upon the express assumption of the contrary, so that the defendants stood in court as the conceded proprietors of the site of their railway. The plaintiff was not at liberty to shift his ground, and to question on the trial what he had admitted in his pleadings.

Assuming, then, that the plaintiff's oxen were on the land of the defendants without right, it was entirely immaterial that the pasture in which they had been kept was well fenced, or that they were quiet and orderly. This evidence, if it were designed to controvert the fact that the oxen went astray upon the lands of the company, was clearly improper under a declaration which conceded that fact; and if it were offered with a view to show that it was through the misfortune rather than the fault of the plaintiff, that the cattle went astray, it could not avail him, since it would neither justify nor excuse their being on the defendants' land.

The main question in this case is presented by the plaintiff's offer to prove that the defendants were guilty of negligence, and that by the exercise of ordinary care on their part the accident might have been avoided. Taking this as proved, the case stands thus: The defendants, in the rightful use of their railway, while propelling an engine with cars attached, and running at a low rate of speed, struck and killed the plaintiff's oxen, which had strayed on the track of the railway and were trespassing at the time. This result might have been avoided by the exercise of ordinary care on the part of the defendants, whose negligence contributed to produce the injury complained of; and the question is, whether, under such circumstances, the plaintiff can maintain his action. It is obvious that the plaintiff would have received no injury, if the oxen had not been on the track of the railway; and having been there without right, the law imputes a fault to the plaintiff. On the other hand, although the plaintiff was in fault, the injury would not have happened but for negligence and

the want of ordinary care on the part of the defendants; and assuming this to have been a fault on their part, the injury then would appear to have resulted from the common fault of both parties. But if we were permitted to inquire as to the degree of blame which attached to each, we should be obliged to pronounce that the principal fault must be attributed to the plaintiff, and without the previous existence of which, the defendants could not have been required, in the proper use of their railway, to abate their speed, or take any precaution whatever for the protection of the plaintiff's property. The case is stronger for the defendants than if it had arisen on a highway between persons in the enjoyment of the common right of travel, and where the injury resulted from the negligence of both parties. The plaintiff in such a case would start by showing himself in the exercise of a lawful right—and yet if it appeared that his own negligence or unskillfulness in any way conduced to bring about the injury complained of, he could not recover, whatever might have been the negligence of the defendant. The law will not in such a case attempt nicely to adjust the degree of blame to be assigned to the respective parties; and will not recognize any act as an injury to either, which they mutually contributed to produce.

And so far has this doctrine been carried, that a person injured by an obstruction placed unlawfully in a highway has been denied a right of action for damages where it appeared that he had failed to use ordinary care, by which the injury might have been avoided. The plaintiff, before he can stand in court as an accuser, must himself be free from fault. He cannot support his action by basing it partly on his own wrong and partly on the wrong of his adversary. He is answered, when it appears that he has been wanting in duty, or has contributed to his own injury. He has then volunteered to suffer, and the law sees no wrong in the case. So that, whenever it appears that the plaintiff's negligence or wrongful act had a material effect in producing the injury, or substantially contributed toward it, he is not entitled to recover. To this rule there seems to be no exception, which can be made applicable to the case under consideration. Lord Denman, in *Lynch v. Nurdin*, 1 Ad. & El., N. S., 29, allowed an exception in favor of the plaintiff, a child seven years old, who received an injury by getting into the defendant's cart while it was carelessly left in the street. This decision has not, however, been followed in this state; but the negligence and imprudence of the parents or guardians in allowing a

child of tender years to be exposed to injury in the highway has been held to furnish the same answer to an action by the child, as the negligence or other fault of an adult plaintiff would have done in a similar case: *Hartfield v. Roper*, 21 Wend. 615 [34 Am. Dec. 273]; *Brown v. Maxwell*, 6 Hill, 592 [41 Am. Dec. 771].

It is not deemed necessary, after the very able and satisfactory review of the authorities bearing on this subject which was made in this case by Chief Justice Beardsley, as reported in *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255 [49 Am. Dec. 239], to dwell at length upon the cases to which we have been referred upon the present argument. Suffice it to say, that applying the principle of these cases to the facts before us, we are led to the conclusion, that as the defendants were in the lawful exercise and enjoyment of their rights, and would have done no injury to the plaintiff, if his oxen had not strayed on the track of the railway; and as they were there without right, in respect to them the law did not enjoin it as a duty on the defendants to take care not to injure them. The want, therefore, of such care was not in judgment of law a fault to be attributed to the defendants; but if it could be so considered, the plaintiff having also been in fault, by which he contributed to produce the injury, is not entitled to recover: *Pluckwell v. Wilson*, 5 Car. & P. 375; *Williams v. Holland*, 6 Id. 23; *Woolf v. Beard*, 8 Id. 373; *Sills v. Brown*, 9 Id. 601; *Hill v. Warren*, 2 Stark. 277; *Smith v. Smith*, 2 Pick. 621 [13 Am. Dec. 464]; *Lane v. Crombie*, 12 Id. 177; *Sarch v. Blackburn*, 4 Car. & P. 297; *Blyth v. Topham*, Cro. Jac. 158; *Burckle v. N. Y. Dry Dock Co.*, 2 Hall, 151; *Rathbun v. Payne*, 19 Wend. 399; *Bush v. Brainard*, 1 Cow. 78 [13 Am. Dec. 513]. The judgment of the supreme court must be affirmed.

Judgment affirmed.

CONTRIBUTORY NEGLIGENCE OF PARTY INJURED DEFEATS RIGHT OF ACTION: See *Kennard v. Burton*, 43 Am. Dec. 249; *Irvine v. Sprigg*, 46 Id. 667; *Birge v. Gardner*, 50 Id. 261, and cases in notes thereto. The principal case has been frequently cited as an authority on this proposition: *Purvis v. Coleman*, 21 N. Y. 117; *Deyo v. New York Cent. R. R.*, 34 Id. 11; *Milton v. Hudson River Steamboat Co.*, 37 Id. 212; *Welling v. Judge*, 40 Barb. 207; *Burke v. Broadway etc. R. R.*, 49 Id. 531, per Miller, J., dissenting; *Honegsberger v. Second Ave. R. R.*, 2 Abb. App. Dec. 381; S. C., 33 How. Pr. 199, 200; 1 Keyes, 572, 573; *Owen v. Hudson River R. R.*, 2 Bosw. 378; *Delafield v. Union Ferry Co.*, 5 Robt. 216; *Carroll v. New York etc. R. R.*, 1 Duer, 581; S. C., 11 N. Y. Leg. Obs. 148. A trespasser acts at his peril: *Roulston v. Clark*, 3 E. D. Smith, 373. The rule deduced from the English cases in *Center v. Finney*, 17 Barb. 98, was that "the plaintiff may recover if he could not have avoided the consequences of the defendant's negligence by the use of

ordinary care." The court, however, remarked, citing the principal case among others, that the language of some judges in New York and in England may go further, but the English cases were at *nisi prius*, and on examination of the New York decisions, the court doubts "whether one of them will be found to have been actually decided contrary to the English rule." In *Baxter v. Second Ave. R. R.*, 30 How. Pr. 222, S. C., 3 Robt. 513, it was held, citing the principal case, that a charge limiting the plaintiff's negligence to "a want of common, ordinary care or prudence," was correct. A distinction was sought to be made in *Gonzales v. New York etc. R. R.*, 30 How. Pr. 414, 415, between such cases as the principal case, where there was no privity of contract between the plaintiff and defendant, and the defendant had not assumed any special obligations or duties towards the plaintiff, and cases where the one injured was a passenger of a railroad; and see *Ingalls v. Bills*, 43 Am. Dec. 346, and note, on the liability of common carriers for injuries sustained by passengers. See also the principal case cited in *Galens etc. R. R. v. Jacobs*, 20 Ill. 496; *Chicago etc. R. R. v. Patchin*, 16 Id. 202, as sanctioning the case of *Hartfield v. Roper*, 21 Wend. 615; S. C., 34 Am. Dec. 273. A declaration that defendant knowing that the plaintiff, a child eight years old, had neither experience in nor knowledge of the use of gunpowder, and was an unfit person to be trusted with it, sold and delivered gunpowder to him, and that he, in ignorance of its effects, and using that care of which he was capable, exploded it and was burned thereby, sets forth a good cause of action, distinguishing the principal case, in that in the latter there was contributory negligence: *Carter v. Towne*, 98 Mass. 569. In *Lannen v. Albany Gas Light Co.*, 46 Barb. 270, it was said, citing the principal case, that there were some cases which hold an infant who brings an action for damages reponsible for his own negligence, in the same manner as if he were an adult, upon the ground that infancy must be used as a shield, and not as a sword, and upon the ground that the negligence of the parent or guardian must be imputed to him; but there was "no just or legal principle which, when the infant himself is free from negligence, imputes to him the negligence of the parent, when, if he were an adult, he would escape it."

The above rule of contributory negligence has been frequently applied, on the authority of the principal case, to railroad companies injuring stock trespassing on their tracks: *Corwin v. New York & E. R. R.*, 13 N. Y. 46; *Hance v. Cayuga & S. R. R.*, 26 Id. 432; *Talmadge v. Rensselaer & S. R. R.*, 13 Barb. 497; *Terry v. New York Cent. R. R.*, 22 Id. 583; *Bowman v. Troy & B. R. R.*, 37 Id. 518; *Staats v. Hudson River R. R.*, 39 Id. 296; S. C., 23 How. Pr. 463; *Chicago etc. R. R. v. Patchin*, 16 Ill. 202; *Pittsburgh etc. R'y v. Stuart*, 71 Ind. 505, 507; *Mentges v. New York & H. R. R.*, 1 Hilt. 426; and the defendants owe no duty, save not to wantonly or recklessly injure the stock: *Spinner v. New York etc. R. R.*, 67 N. Y. 156; *Maynard v. Boston etc. R. R.*, 115 Mass. 480; but if the beasts were lawfully on the track, no matter how they came there, the owner could have recovered by showing negligence on the part of the railroad company: *Eaton v. Delaware etc. R. R.*, 57 N. Y. 396, *per Earl, C.*, distinguishing the principal case, which holds that there could be no recovery because the animals were unlawfully there; and see *Purdy v. New York etc. R. R.*, 61 N. Y. 355, in reference to a liability created by statute. See also *Needham v. San Francisco etc. R. R.*, 37 Cal. 417, disapproving of the doctrine of the principal case, and of *Tonawanda R. R. v. Munger*, 49 Am. Dec. 239. The subject of the liability of railroad companies for injuring animals is fully discussed in the note to *Tonawanda R. R. v. Munger*, *supra*; and see, further, *Perkins v. Eastern R. R.*, 50 Id. 589; *Vandegrift v. Rediker*, 51 Id. 262.

CASES IN EQUITY
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

McBRAYER v. HARDIN.

[7 IREDELL'S EQUITY, 1.]

MOTION TO DISSOLVE INJUNCTION WILL BE REFUSED, and the injunction will be continued till the hearing, where it was granted to restrain the defendants from working gold mines claimed by the defendant, and when, if the facts are as stated by the defendants, the injunction could do them no harm, but if the truth is as averred by the plaintiffs, the dissolution of the injunction would work them a serious injury.

APPEAL from the Cleveland county equity court. The opinion states the case.

J. G. Bynum, for the plaintiffs.

G. W. Baxter and Landers, contra.

By Court, PEARSON, J. The plaintiffs allege that in July, 1849, they leased from the defendant Joseph Hardin, for the term of five years thence next ensuing, a tract of one hundred and fifty acres of land, on which the said Hardin then resided lying on the waters of Little Hickory creek, in the county of Cleveland, adjoining the land of the widow Hogue, for the purpose of hunting for gold and silver mines, and with the right and privilege of working all the mines then known on the said land, or that might be discovered during the term of the said lease. The lease was reduced to writing and executed, and left with one Fullenwider for safe keeping, and the defendant Joseph Hardin afterwards got possession of it and refused to return it. The bill then states that afterwards the defendants, Joseph Hardin, and William McEntire, Jefferson Hoskins, Edmond Rippy, John Roberts, and Dial Hardin, under his

authority entered on the land and have been working for gold, in despite of the rights and remonstrances of the plaintiff, and have done and are doing irreparable damage, by taking off large quantities of gold and working the mines in an unskillful manner. The prayer is, that the defendants may be enjoined from working on the land included in the lease to the plaintiffs, and for an account of the gold collected by the defendants.

The defendant Joseph Hardin answered, but he submitted to the decretal order, continuing the injunction until the hearing, and his answer was not sent to this court.

The defendants McEntire and Hoskins admit that, in the month of August, 1849, with the consent of their co-defendant, Joseph Hardin, they worked on the land included in the lease for a short time, and made some seven pennyweights of gold each. They aver that they believed that the said Hardin had full power and authority to put them in possession, but being afterwards informed by some of the plaintiffs that they were entitled to all mining privileges under their lease, they quit the land before the bill was filed and have not since interfered.

The defendants Rippy, Roberts, and Dial positively deny that they have ever worked for gold on the land included in the lease made by Joseph Hardin to the plaintiffs. They say it is true they have been working on the land adjoining the land of the said Hardin, but the land on which they have been working belongs to the defendant Roberts, and has been notoriously in his possession for more than twenty years, and never did belong to nor was in possession of the defendant Joseph Hardin, and is not included in the land leased by the said Hardin to the plaintiffs.

The motion to dissolve the injunction was refused, and the injunction was continued until the hearing, from which order all of the defendants, except Joseph Hardin, appealed.

As to the defendants McEntire and Hoskins, they admit that they worked a short time under the license of Joseph Hardin, after he had leased to the plaintiffs; but they say they had left the land before the bill was filed, and have no intention further to interfere. Such being the case, the injunction can do them no harm, and at the final hearing their liability to account, and their right to recover costs, can be investigated and passed on.

As to the defendants Rippy, Roberts, and Dial, they say the land on which they are at work is not included in the lease to the plaintiffs. If this be true, the injunction does not inter-

fere with them, and will do them no harm. If it be not true, and they are, in fact, working on the land of Joseph Hardin, which he leased to the plaintiffs, then it is admitted that they should be enjoined. If the defendants tell the truth, the injunction can do them no harm. But if the truth is as averred by the plaintiffs, a dissolution of the injunction would be of serious injury to them. Hence it was necessary, under the circumstances, to continue the injunction. By doing so, no harm is done on one side, and the chance of doing injury is avoided on the other. Injunctions of this kind are not put on the same footing with injunctions to stay executions on judgments at law, where the legal rights of the parties have been adjudicated.

This opinion will be certified to the court below. The defendants must pay the costs of this court.

Ordered and decreed accordingly.

COURT WILL NOT DISSOLVE SPECIAL INJUNCTION WHERE IRREPARABLE INJURY IS ALLEGED by the plaintiff and is made apparent by allegations in his bill, simply on the denial in the defendant's answer: *Troy v. Norment*, 2 Jones Eq. 318, citing the principal case; the court said that the principle governing such an application was fully stated in the principal case and *Purnell v. Daniel*, 8 Ired. Eq. 9. See also *Doughty v. S. & E. R. R. Co.*, 51 Am. Dec. 267.

BLANTON v. MORROW

[7 IREDELL'S EQUITY, 47.]

EXECUTION CREATES NO LIEN ON SLAVES NOT WITHIN COUNTY, and does not affect the debtor's right to dispose of them.

INTEREST OF REMAINDERMAN IS SUBJECT TO BE SOLD UNDER EXECUTION; but the property, if personalty, must be present at the sale in order to render it valid.

STITH MAYES, on his death, bequeathed certain slaves, amongst his other property, to his wife for life, and then over to his children. James, one of the children, during the life of the widow, sold his interest in the estate to one Morrow. A judgment was afterwards recovered against Morrow by one McBurney; a *fi. fa.* was issued and delivered to the sheriff, who advertised the interest of Morrow in the negroes for sale. Blanton became the purchaser at the sale. None of the slaves were present at the sale, some being in another state, others in a different county; while those who were in the county were in the possession of persons to whom they had been leased by the widow. Afterwards, on the death of the widow, a partition of the estate was had, and it was agreed that the question

of right between Morrow and Blanton should be determined by the court. The court, after deliberation, decided that Blanton's purchase was void, and that Morrow's title was good. Blanton appealed.

J. G. Bynum, for the plaintiff.

J. Baxter, contra.

By Court, RUFFIN, C. J. The only question is as to the effect of the plaintiff's sale, and upon that the court concurs with his honor that it did not divest the title of Morrow. It is so, beyond doubt, as to the slaves, which were not in the sheriff's county; for the execution did not create a lien on them, nor affect the debtor's right to dispose of them: *Den ex dem. Hardy v. Jasper*, 3 Dev. 158. The cases cited in the argument of *Knight v. Leak*, 2 Dev. & B. 133, and *McLeod v. Pearce*, 2 Hawks, 110 [11 Am. Dec. 742], show that it is the same with respect to those which were in the county. For although such a vested interest as Morrow had in these slaves is liable to be sold under execution, yet the other cases establish also that this forms no exception to the general rule that personal property sold under execution must be present in order to render the sale valid.

That is all which it is necessary for the court to say for the purposes of this cause. But it seems to be proper, in order to avoid embarrassment to officers and to prevent doubts as to the proper course to be pursued in such cases, that it should be added that the court is of opinion that from the necessity of the case the tenant of the particular estate must submit to the inconvenience of producing the slaves at the day and place of sale, or if that could not be satisfactorily arranged between the tenant and the sheriff, to the further inconvenience of a seizure by the sheriff for the purpose of securing the property and making the sale. That results from the two propositions, that the remainder or reversion is subject to execution, and that the thing itself, in which such an interest is vested in the debtor, must be present when it is sold. That course, it is believed, has been generally, if not universally, observed. It stands on the same principle on which the sheriffs seize the share of a tenant in common on a *fieri facias* against him alone. There is, therefore, no error in the decree, and it must be so certified; and Blanton must pay the costs in this court.

Ordered and decreed accordingly.

previous cases in this series. The principal case was cited to the point that the sale of a negro under execution was void, if he was not present, in *McLeran v. McKethan*, 7 Ired. Eq. 72.

REVERSIONARY INTEREST, HOW FAR SUBJECT TO SALE ON EXECUTION: See *Smith v. Niles*, 49 Am. Dec. 782, and note, citing cases as to liability of interest of a vested remainderman to levy and execution. See also *De Haas v. Bunn*, 44 Id. 201, and note to *Hyde v. Burney*, Id. 339.

HARRIS v. HARRIS.

[7 IREDELL'S EQUITY, 111.]

FEME COVERT ENTITLED TO SEPARATE ESTATE IN PERSONAL PROPERTY, unless there be some clause of restraint of her dominion, may convey it, and do all other acts in respect to it, in the same manner as if she were a *feme sole*.

SETTLED RULE OF COURT OF EQUITY IN ENGLAND BEFORE REVOLUTION is obligatory upon the courts here, just as much as any other established rule of property derived from our ancestors, where there is no legislation on the subject, and no repugnancy to our form of government.

F. WARD conveyed a negro girl to Thomas Ward in trust for the separate use of Nancy Harris for her life, free from the control of her husband William; and after her death, the girl, with her increase, to go to the separate use of Elizabeth Ledbetter and Sally Scorey, free from the control of their husbands, and upon the death of either or both, to go one half to the children of Elizabeth, and the other half to the children of Sally. There was no clause in the conveyance restraining the disposition of the slave. The girl was in the possession of Harris and wife. Afterwards, Harris being much indebted, and Ledbetter and Scorey being his sureties, they and their wives, the beneficiaries in the conveyance, joined in a sale of the negro girl and one of her children to the defendant, and made a deed with covenants of general warranty. The plaintiffs, the beneficiaries in the deed of settlement, now file this bill to set aside the conveyance, charging that the defendant purchased with notice of the deed of settlement, and prayed that he might be decreed to deliver up the slave and her increase, and account for the hires, that the purposes of the deed of settlement might be performed.

Guion, for the plaintiffs.

Bynum, contra.

By Court, RUFFIN, C. J. The plaintiffs have failed to establish any extraneous circumstance to impeach the conveyance to the defendant. Indeed, the allegations of the bill are expressed

in such general terms, that one must suppose that no relief could be expected on them; and that it was intended to put the relief on the ground that the conveyance by a married woman of a slave, held by a trustee, to her sole and separate use, is inoperative. The opinion of the court, however, is to the contrary; and we hold that a *feme covert*, entitled to a separate estate in personal property, unless there be some clause of restraint of her dominion, may convey it and do all other acts in respect to it in the same manner as if she were a *feme sole*. That is the settled law of the court of equity in England, and was long before the revolution; and it is, therefore, obligatory upon the courts here, just as much as any other established rule of property derived from our ancestors. To go no further back, it was unquestionable law in Lord Hardwicke's time. In *Peacock v. Monk*, 2 Ves. 191, he points out the difference in that respect between real estate and personalty, or the profits of real estate, which in fact is personalty, and goes to the executor; and he gives the reasons for the difference. As to personal property, he says, where the wife has a separate use in it, "she may dispose of it by an act in her life-time or by will. She may do it by either, though nothing is said of the manner of disposing of it"—that is, in the settlement or articles. That has never been denied in England from that day to this, though the grounds of the rule have been often stated in subsequent cases, and the principle itself more distinctly explained. In *Fettiplace v. Gorges*, 1 Ves. jun. 46, and S. C., 3 Bro. C. C. 8, it was, for example, stated in terms that personal property, settled or agreed to be settled to the separate use of a married woman, may be disposed of by her as a *feme sole* to the full extent of her interest, although no particular form for doing so is prescribed in the instrument. The principle of that rule is, that she takes separate property as hers exclusively, with all the rights and incidents of property; of which one, and a most important one, is the right of disposition. The principle has been applied to all cases since, in whatever form they may have arisen. Thus she may convey personalty in which she is entitled to a separate use in reversion, as well as a present interest: *Sturgis v. Corp*, 13 Ves. 190. She may sell or give even to her husband, since in respect of that property they are regarded as distinct persons, like other strangers; though the court will scrutinize such dealings upon a natural suspicion of actual constraint on her: *Pawlet v. Delaval*, 2 Ves. sen. 663; *Squire v. Dean*, 4 Bro. C. C. 326. She may not only convey her separate property, but, without the consent

of her husband or trustee, she may incumber it by mortgage, or charge it by contracting debts, as by giving a bond for so much money merely: *Fettiplace v. Gorges*, 1 Ves. 46, and *Hulme v. Tenant*, 1 Bro. C. C. 16; S. C., 2 Dick. 560.

Other instances need not be cited as evidence that in the last case Lord Thurlow laid down the rule as correctly as he did explicitly, which he took from *Peacock v. Monk*, 2 Ves. 191, that a *feme covert*, acting in respect of her separate personal property, is competent to act in all respects as if she were a *feme sole*. He says it was impossible to say the contrary. Now, beyond all controversy, the ground of that rule is not any capacity or power supposed to be imparted to a married woman by her husband, or by the instrument creating the separate use, as a capacity or power thereby created, and subsisting by itself, apart from the property; but it arises out of the ownership of the property, and the right such absolute ownership imparts to the person, to do with it as she pleases. When equity adopted the principle allowing that separate property might be vested in a married woman, which the law denied, it followed, as being inherent in the *jus proprietatis*, that there should be the *jus disponendi*. That is declared in all the cases to be the principle; and there is no contradiction among them. Even when a gift is made in general terms to the sole and separate use of a *feme covert*, and the instrument goes on to add that she may dispose of it in some particular manner, as by deed or will, yet she may do so in any other manner, by reason of her general property, in which the power is merged: *Elton v. Sheppard*, 1 Bro. C. C. 532; *Hales v. Margerum*, 3 Ves. 299. Such being the nature of a *feme covert's* right to dispose of her separate property—conferred by equity, not created by the settler—the doubt was, whether any restraint upon the right of alienation by the provisions of the deed was admissible. Upon principle, it unquestionably was not; because the common law denies such a restriction, and in respect to equitable estates, the general rule is that equity follows the law. But this anomaly was admitted by the court of equity in order the more effectually to protect the wife from the control or solicitations of her husband, and thereby make the separate property a more effectual provision. As was observed by Judge Gaston in *Dick v. Pitchford*, 1 Dev. & B. Eq. 480, the controversy upon that point is settled by authority in England, in the cases cited by him.

But that very controversy only shows more conclusively that but for the provisions in the instrument in restraint of the an-

icipation of profits or alienation of the capital, the right of disposition existed as an absolute right belonging to the owner of the property. Is there any reason why the judges of this court should not hold the law to be the same here? or rather, why we should not be obliged so to hold? There seems to be none whatever—no plausible ground for setting up a new rule upon their own arbitrary will. If there had been any legislation on the subject at all incompatible with the law our ancestors brought with them; if there were anything in those rules repugnant to or inconsistent with the form of government, as it is expressed in the statute, respecting the parts of the common law to be in force here—then the judges ought to conform and mold the rules to correspond by proper qualifications. But we are not aware of any such legislation or repugnancy. On the contrary, the courts of this state have heretofore proceeded on the idea that they were to administer the law upon this subject as they found it, as in other instances. In *Dick v. Pitchford*, 1 Dev. & B. Eq. 480, just quoted, this doctrine of equity is recognized, and used as illustrating the question then before the court, which was the right of a male *cestui que trust* so assign the trust fund, though by the terms of the deed the trustee was to apply the profits annually to his use. In other cases of creditors seeking satisfaction out of a trust fund intended to be tied up beyond the control of an improvident *cestui que trust*, it has been said that the only instance in which such a provision could hold was in that of a married woman—thus implying that without the provision, there would be no restraint on her. Again, so far from considering the separate property of a married woman susceptible of transfer, under the idea of her executing a power, it was held in *Miller v. Bingham*, 1 Ired. Eq. 423 [36 Am. Dec. 58], that when property was thus conveyed during the marriage of a *feme*, the separate use itself ceased *ipso facto*, upon the determination of the coverture, and was converted into an ordinary trust for the *feme*, and so vested in her second husband. And in *Frazier v. Brownlow*, 3 Id. 237 [42 Am. Dec. 165], the general principle was declared as derived from *Hulme v. Tenant*, 1 Bro. C. C. 16, and other cases, that debts contracted by a *feme covert*, in reference to her separate personal property, bound such property in the hands of her trustee, and satisfaction of the debt was decreed out of slaves held to Mrs. Brownlow's separate use, though the deed for the slaves contained no power to her to charge debts or alien.

Let it not be said that the slaves were the produce of the

profits of the land, which were at her disposal, and therefore that the creditors had a right to follow those profits in the slaves, in which they were invested. That was not the principle of the decree or of the opinion given. On the contrary, the relief proceeded simply and exclusively on the fact that the slaves were purchased and held by the trustee to her separate use. In *Newlin v. Freeman*, 4 Ired. Eq. 312, it was expressly held that the circumstance of the investment of the wife's separate money in other property can have no effect, and that the property thus purchased will be treated as if it had been derived in any other manner; that is, that its nature will depend on the nature of the conveyance taken for it. In that case, accordingly, land which was bought with the separate money of the wife and conveyed to a trustee for her, but not to her separate use, and without a power to her to devise it, could not be disposed of by her will, though the marriage articles authorized her to devise the land she had at the marriage and also all her personal property. Besides, how does she get the right to dispose of the profits more than the capital? If it be said that the perception of the profits is the use given to her, the answer is, that the use secured to her is as much the use of the capital as of the profits—all consisting of property the same in kind, namely, personalty, and therefore each must be equally at her disposition. It is clear, therefore, that *Frazier v. Brownlow*, 3 Ired. Eq. 237 [42 Am. Dec. 165], proceeded upon the general principle, that, as to separate personal property, the lady was a *feme sole*, and therefore equity would lay hold of that property for the benefit of her creditors—at least, where she charged the debt on it. If, in that case, after purchasing the slaves with her own money, she had taken the conveyance to herself or to a trustee for her simply, and not expressing it to be for her separate use, there can be no doubt but they would have belonged to the husband. But when she took a deed to a trustee to her separate use, then, without any regard to the source from which the purchase-money was derived, the slaves as her separate personal property, and, as such merely, were charged with her debts and became liable to be sold for their satisfaction, as an incident of ownership, as legal personal property may be taken at law by execution. That case is therefore a precise authority that, in respect to such separate property, a married woman is held here, as in England, to act as a *feme sole*. Hence, if the courts here had been at liberty formerly to pay no respect to the principle so long settled in the mother country and to invent a new system for

use here, it seems clear that, upon every principle on which judicial precedents obtain authority, the series of *dicta* and decisions in this state should be conclusive with the present judges.

It is said, indeed, that a contrary course has been followed in some of our sister states. But, we believe, not after many adjudications had been made conformably to the old law. In New York, it is true that it was once held that a married woman was not to be deemed a *feme sole* in respect to her separate property, save only *sub modo* and to the extent and in the manner prescribed in the instrument creating the estate: *Methodist Church v. Jaques*, 3 Johns. Ch. 78. But even the authority of Chancellor Kent's great name could not uphold that position; and, upon appeal, the decree was reversed in the court of errors upon the opinions of the most eminent judges: *Jaques v. Methodist Church*, 17 Johns. 549 [8 Am. Dec. 447]. Since that time, by various judgments of the court of errors and Chancellor Walworth, the old doctrine is re-established in its integrity. In South Carolina, it seems to be settled otherwise, it must be admitted. But that seems to have been upon the authority of an early case in that state, *Ewing v. Smith*, 3 Desau. 417 [5 Am. Dec. 557], reversing a decree of Chancellor Desaussure founded on full research in the cases on this subject and their reasons. It is true that Judge Harper, in *Reid v. Lamar*, 1 Strobb. Eq. 27, speaks of the restriction on the right of the *feme* to dispose of her property except under an express grant of power, as more in conformity with the policy on which the right of separate property to the wife was allowed in equity. But he means only thereby that it the better protects the interests of the wife, and not that it is against the public policy, that a married woman should have the right of disposition. He could not mean the latter; for, if that were true, then even the most express grant in the settlement would not confer the power, since the law never suffers the acts of parties to defeat its policy. Yet he admits, and no one can deny, that at all times a married woman has been capable of executing a power, and that for her own benefit as well as that of another. And the late Mr. Justice Story, subsequently to all the American adjudications, states the old rule of equity as being yet the rule, without any qualification from those decisions: 2 Story's Eq. Jur., secs. 1339 et seq.

It is in fact, then, not a question of policy, but simply a question of construction of the instrument creating the estate; whether, when it conveys property to the separate use of a mar-

ried woman, it means to restrain her right of alienation, as incident of ownership, when it expresses no restraint, or only when the intention to restrain is declared in the instrument. It might have been contended, with some apparent reason, to be against the policy of this country and the habits of our domestic relations, to allow separate equitable property in a wife at all. But it is too late to think of that; and it is, moreover, altogether a different question from the present. Being allowed, the dispute now is as to the meaning of the instrument. This dispute is, therefore, merely as to the form of conveyances or agreements for the separate use of a *feme covert*, and does not in the least concern the policy of the law or the institutions of the country, since, by express provisions, the parties may undoubtedly confer the power of disposition or restrain it. That being the true nature of the question, it would seem to be too much like unsettling the forms of conveyances and the rules of property to say, contrary to a very old rule of construction, that the parties intended to restrain alienation, though they do not say so. It is enough to fetter an owner, when the donor says he does not mean she shall dispose of the property, but only enjoy the profits during her coverture or life. Suppose a parcel of chargeable or sick slaves to be a married woman's separate property and all her property. How are they to be fed, clothed, or cured, unless debts can be contracted on their credit, or some of them may be sold? Yet upon the doctrine that she can move only under a power, she is perfectly helpless, and the slaves must be left to their fate of destitution or death; or an exception must be admitted, which shows that there is either no general rule, or one to which exceptions may be arbitrarily allowed, without regard to the supposed meaning of the deed and intention of the parties.

The plaintiffs, therefore, who are married women, are concluded by their deed, which in this court is considered as passing all their estate; and as no relief is sought except against the deed, the bill must be dismissed, with costs.

Bill dismissed, with costs.

PEARSON, J., delivered a dissenting opinion.

CONTROL OF MARRIED WOMAN OVER HER SEPARATE ESTATE.—This subject is discussed in the notes to *Ewing v. Smith*, 5 Am. Dec. 557; *Thomas v. Fohwell*, 30 Id. 220; see also *Scarborough v. Watkins*, 50 Id. 528, and note; *Calhoun v. Calhoun*, 49 Id. 667; *Coryell v. Dunton*, Id. 489; *Youse v. Norcome*, 51 Id. 175; *Hollis v. Francois*, Id. 760; *Callahan v. Patterson*, Id. 712. In *Williamson v. Williamson*, 4 Jones Eq. 287, the principal case was cited to

the point that where a testator gives to his executors, for the sole and separate use of his wife, the property he has put into her possession, the wife takes a separate estate, and the trustees may permit her to have possession of it and use and enjoy it with her family; and as there was no clause of restraint, she was entitled, not only to the interest, but the principal of the money given her, should her necessities require it. The doctrine of the principal case has not been followed in North Carolina. The courts in subsequent cases have been unwilling to adopt its liberal rule in favor of married women. In *Knox v. Jordan*, 5 Jones Eq. 176, Manly, J., said: "In the case of *Frazier v. Brownlow*, 3 Ired. Eq. 237, it has been decided by this court that a married woman may, in an obligation which she contracts, specifically charge the same on her separate property, where it is done with the concurrence of the trustee. And in the case of *Harris v. Harris*, 7 Id. 111, it is decided where slaves are bequeathed to the sole and separate use of a married woman during her life, and then for the use of two daughters, and then over to their children, that a sale by the woman in which her husband, the daughters, and their husbands joined, was good. It was not necessary to this latter decision that a principle should be resorted to different from that on which *Frazier v. Brownlow* rests. The sale by the parties might have been upheld for the life of the wife as a charge upon the profits only; and in that way the two would have been consistent, and stood upon ground which we think more compatible with the objects of such settlements and the rules of the common law. The principle of the case of *Frazier v. Brownlow* we adopt, because we are unwilling to take a step backward and unsettle a matter which has been considered settled so long, and which has, we doubt not, been frequently followed. But we are, at the same time, unwilling to depart further from the principles of the common law in relation to the disabilities of married women, and run into the labyrinth of difficulties which allows the doctrine whereby they are treated as *femes sole*. We prefer adhering as closely as may be, consistently with decided cases, to the rule that a separate estate for the support of a married woman does not confer any faculties upon her, except those which are found in the deed of settlement, and that in all other respects she is a *feme covert*, and subject to the usual disabilities." This subject was again considered in *Hardy v. Holly*, 84 N. C. 667, and Ruffin, J., said: "In the courts of equity of a majority of the American states, . . . a married woman entitled to a separate estate is regarded as a *feme covert*, and subject to every disability of the common law, except as she may have power conferred upon her under the deed of settlement in express and positive terms. When the point was first presented in this state, as it was in the case of *Frazier v. Brownlow*, 3 Ired. Eq. 237, this court followed the lead of the English chancellors, and gave the fullest indulgence to the powers of the wife; and so again it was done in *Harris v. Harris*, 7 Id. 111, though in this latter case there was a division of opinion amongst the judges which caused the question to be much discussed. It can do no good at this day to revive that discussion, nor is it necessary. For when the question next arose in the case of *Knox v. Jordan*, 5 Jones Eq. 175, the court as then constituted, and without division, and without any sort of reservation, repudiated the doctrine of the English courts, and adopted that which prevailed in most of the courts of the states, and whether this was wisely done or not, that case has been too often approved, and doubtless too often acted upon in matters intimately connected with the interest and comfort of families, to admit of its correctness being now called in question. We must take it to be the settled law of this state, at least, that a married woman, as to her separate property, is to be deemed a *feme*

sole only to the extent of the power expressly given her in the deed of settlement. Her power of disposition is not absolute, but limited to the mode and manner pointed to in that instrument; and, when that is silent, she is powerless."

STATE EX REL. P. W. SPENCER v. MOORE.

[11 IREDELL'S LAW, 100.]

RULE AS TO PRESUMPTION OF DEATH is that it arises from the absence of the person from his domicile without being heard of for seven years; but it seems rather to be the current of authorities that the presumption is only that the person is then dead, namely, at the end of the seven years, and does not extend to the death having occurred at the end or any other particular time within that period, but leaves it as a matter of fact whether it was at an earlier or a later day.

NEXT OF KIN CANNOT HAVE ACTION ON ADMINISTRATION BOND where the administrator has not administered the estate, but the right to call him to account and to put the bond in suit is vested in the administrator *de bonis non*.

SAMUEL SPENCER died intestate and without issue in 1846. One Gibbs was appointed his administrator, and having married Samuel's aunt, claimed to be entitled to the personalty in her right, as sole next of kin. He sold the effects, appropriated the money to his own use, and died insolvent in 1848. John, a brother of Samuel, had formerly lived in the same county with Samuel, but had left the state in 1841, and had never been heard of from that time. In 1848 letters of administration on his estate were granted to the relator, and he brought an action on the bond of Gibbs for his breach in failing to pay over the sum he had appropriated to the relator as the administrator of John, the surviving brother and next of kin of Samuel. The court nonsuited the plaintiff, being of opinion that he could not maintain the action. The relator appealed.

Shaw, for the plaintiff.

W. H. Haywood and Donnell, contra.

By Court, RUFFIN, C. J. To constitute the relator's intestate Samuel's next of kin, it is necessary that John should have survived his brother; as to which point the only evidence is that at the time of Samuel's death seven years had not elapsed from John's departure from this state, though that period has now elapsed, and had, when administration was granted to the relator. It is thence inferred that John Spencer is now dead; but that he was not dead at his brother's death in 1846. The

rule as to the presumption of death is, that it arises from the absence of the person from his domicile without being heard of for seven years. But it seems rather to be the current of the authorities that the presumption is only that the person is then dead, namely, at the end of seven years; but that the presumption does not extend to the death having occurred at the end or any other particular time within that period, and leaves it to be judged of, as a question of fact, according to the circumstances which may tend to satisfy the mind that it was at an earlier or later day: *Doe v. Nepean*, 5 Barn. & Adol. 86; 1 Greenl. Ev., sec. 41. The authorities, however, are not uniform upon the point: *Smith v. Knowlton*, 11 N. H. 191. However the rule may be on that subject, it is not necessary that the courts should take the trouble of investigating, because, at all events, the relator, as the representative of the next of kin, cannot have an action on the administration bond. By the very act of bringing the suit, the relator affirms that the first administrator had not administered the estate. Therefore, the right to call him to account and to put the bond in suit is vested in the administrator *de bonis non*, as the court has already held during this term in *State ex rel. Williams v. Britton's Adm'r*, 11 Ired. L. 110, upon the authority of the previous case of *State v. Johnston*, 8 Id. 381, 397.

Judgment affirmed.

PRESUMPTION OF DEATH FROM ABSENCE: See *Burr v. Sim*, 33 Am. Dec. 50, and note; *Lewis v. Mobley*, 34 Id. 379, and note; *Hayes v. Berrick*, 5 Id. 727; *King v. Fowler*, 22 Id. 370; *Cameron v. State*, 48 Id. 111. Where a person has been absent seven years without having been heard of, the only presumption arising is that he is then dead—there is none as to the time of his death; where a precise time is relied on, it must be supported by sufficient evidence before the jury, besides the lapse of seven years since the person was last heard of: *Spencer v. Roper*, 13 Ired. L. 333; the facts in that case were the same as in the principal case, and the court expressly adopted and followed its rule.

DEVASTATION OR MALADMINISTRATION OF EXECUTOR, REMEDY FOR, IS WITH HEIRS, distributees, etc., and not with the administrator *de bonis non*: See *Stubblefield v. McRaven*, 43 Am. Dec. 502.

THE PRINCIPAL CASE WAS CITED to the point that the rule was inflexible that the next of kin cannot call for an account and distribution of the intestate's estate without having an administrator before the court, in *Lanedell v. Winstead*, 76 N. C. 369; referred to in *Strickland v. Murphy*, 7 Jones L. 243, on the proposition that where an administrator dies before the estate has been fully and finally settled there must be an administrator *de bonis non* appointed, who alone can collect what may still be due the estate, and upon whom alone the creditors and next of kin can call for payment of their debts or distributive shares. And regarded as an authority in *Ferebee v. Baxter*, 12

Ired. L. 65, for the position that upon the death of an administrator, the duty of settling up the estate devolves on the administrator *de bonis non*; that the representative of the first administrator has nothing to do with it except to account for and deliver over to the administrator *de bonis non* such assets as may remain undisposed of; and that creditors cannot sue him directly, nor have they a right of action on the first administrator's bond; for the bond does not vary or add to the duties or liabilities of an administrator, but merely increases the security for the performance of his duty.

DICKSON v. JORDAN.

[11 IREDELL'S LAW, 103.]

AT COMMON LAW, NO WARRANTY OF QUALITY WAS IMPLIED IN SALE of goods; *caveat emptor* was the rule, and in the absence of fraud, if the article proved to be of bad quality, the purchaser had no redress, unless he had taken the precaution to require a warranty. This rule prevails in North Carolina.

IMPLIED WARRANTY OF QUALITY IN SALE OF GOODS is not raised by the fact that the seller knew the purpose for which the goods were intended, or that the goods were not present to be judged of by the defendants, if the bad quality could not have been detected by an examination, and it was necessary to put them in use before their unfitness could be discovered.

IMPLIED WARRANTY OF QUALITY DOES NOT ARISE WHERE PURCHASER ORDERS GOODS from the seller, and has no opportunity of seeing them; in such a case the purchaser constitutes the vendor his agent, to select for him, and only has a right to a fair exercise of the vendor's judgment in place of his own, and he has no cause of complaint because of a defect in the goods unless there be fraud.

APPEAL from the Hertford county superior court. The opinion states the case.

Smith, for the plaintiffs.

Bragg, contra.

By Court, PEARSON, J. This was *assumpsit*. The declaration contained two counts: one on a special contract, the other for goods sold and delivered.

The defendants, who were the owners of a fishery, applied to the plaintiffs, who were merchants, at their store in Norfolk, for ten rolls of "seine rope," and informed them that it was to be used at their fishery. The plaintiffs did not have the article on hand, but engaged to procure it and send it to the defendants, at the price of thirteen and three fourths cents per pound, which was accordingly done.

The rope sent was new and of the size and kind known as "seine rope." The defendants used it, but it proved to be of

inferior quality, and repeatedly broke in drawing the seine, and was unfit for fishing purposes. The court instructed the jury that if the plaintiffs knew the purpose for which the rope was intended, and it was not present at the time of the sale, so that the defendants had no opportunity to judge of its quality, the law implied a warranty that it should be reasonably fit for the purpose of fishing. That if the defendants, when the rope was sent, could by examination have detected its bad quality and unfitness, their reception of it was a waiver of the warranty. But if its bad quality and unfitness could not be detected, except by actual trial and using it in the fishing operations, the reception of it was not a waiver of the warranty; and if the jury were satisfied that it was in fact of bad quality and unfit for fishing purposes, they ought to make a reasonable deduction from the price. The jury made a deduction, and the plaintiffs except for error in the charge.

It is a principle of the common law that no warranty of quality is implied in the sale of goods. *Caveat emptor*. In the absence of fraud, if the article proves to be of bad quality, the purchaser has no redress, unless he has taken the precaution to require a warranty. This rule is founded in wisdom; and its practical good sense is so well fitted to the habits of our trading people that we are disposed to adhere to it. We believe it is adopted in almost all of the states of the Union where the common law prevails.

The law protects against fraud, and the vendor is held liable if he knows of the defect. If he is innocent, the purchaser must protect himself by a warranty. And it is supposed that, in general, trade is sufficiently protected, in the absence of fraud, by the inducement which is held out to all dealers to take proper care in the selection of their merchandise, arising from the fact that by selling articles of good quality they secure customers, and by selling those of bad quality their customers desert them. Merchants buy upon their own judgment; they sell upon the judgment of their customers, and only undertake for good faith and fair dealing. If a warranty was implied of the good quality of every article sold, there would be but few merchants, or prices would be exorbitantly high.

His honor was of opinion that in this case there were two facts which furnished a sufficient ground for making an exception to the general rule. The plaintiffs knew the purpose for which the rope was intended, and it was not present to be judged of by the defendants. One or both of these facts might

have been a very sufficient reason for requiring a warranty, and then it is to be presumed an advance in the price would have been insisted on. But we do not see how they can furnish a ground for the law to imply a warranty in favor of the defendants, when they neglected to take one for themselves.

The purpose for which an article is intended is known in almost every case, and the accident that it happens to be expressed, unless it enters into and forms a part of the bargain, can make no difference. One buys a set of harness, for instance. Can it make any difference if he happens to say that his purpose is to use them for his carriage? The purpose is known whether he says so or not, and the price is the same. Where, then, is the consideration to support this implied warranty? what does he pay for it? The case would be different, if he should tell the merchant that his carriage was particularly heavy, or his horses unruly, and he was willing to pay a higher price to have the article warranted to be strong and fit for his purpose. So if two men buy seine rope; one says nothing about his purpose; the other most unnecessarily says he intends it for his fishery; both pay the same price, and the rope turns out to be of bad quality; upon what principle can the one insist on a reduction, while the other is obliged to pay the price agreed on?

But the rope was not present, and the defendants had no opportunity, at the time they engaged it, to judge of its quality. If the bad quality could not have been detected by an examination, and it was necessary to put it in use before its unfitness could be discovered, what did the defendants lose by not having a chance to inspect it? They saw it when it was sent, which answered the same purpose as if they had seen it when it was bought. One inspects for himself; another sends an order—both pay the same price; the rope, upon trial, is found to be unfit—can there be any difference? and from what can the law imply a warranty in the one case and not in the other?

His honor was of opinion that if the bad quality could have been detected by examination, the defendants, by receiving it, impliedly waived the implied warranty. We do not clearly apprehend the meaning of this part of the charge, unless it be that if the defect was obvious the defendants could not, in such case, complain of being cheated, for their means of information were the same as that of the plaintiffs, and a man cannot be cheated who acts with his eyes open, and knows of the defect before the contract is executed. In this we concur.

The only difference it can make when the purchaser sees the article and when he sends an order, or has not an opportunity to see it, is, that in the former case he judges for himself; in the latter, he constitutes the vendor his agent to select for him, and from the confidence reposed has a right to expect that the vendor will give him the aid of his judgment. But this does not furnish ground to imply a warranty; there is no consideration for that. It only gives him a right to a fair exercise of the vendor's judgment in place of his own, and he has no cause of complaint unless there be fraud, from which the law equally protects in both cases.

The decisions in which an exception is made when the vendor is the manufacturer of the article, have no application to the present case, and we do not enter upon the inquiry how far the exception is well founded.

There was error in the charge. There must be a *venire de novo*.

Judgment reversed, and *venire de novo*.

NO WARRANTY OF QUALITY IS IMPLIED IN SALE of goods at law: *Kingsbury v. Taylor*, 50 Am. Dec. 607. The principal case was cited with others in *Waldo v. Halsey*, 3 Jones L. 109, as showing that this court has steadily adhered to the maxim of *caveat emptor*, and held the law to be, that as to title a fair price implies a warranty, but as to soundness or quality there is no warranty implied, and unless the purchaser takes an express warranty he can claim damages only on the ground of deceit; and in *Smith v. Love*, 64 N. C. 441, the court said that the principal case supported the instruction, that if the article sold was a genuine article, no matter how deficient in quality, the contract price must govern. In *Dickson v. Jordan*, 12 Ired. L. 81, an attempt was made to distinguish the principal case as to the doctrine that no warranty of quality was implied, on the ground that in the case under discussion no price was agreed on, but the court said the fact that no price was agreed on could not distinguish the principal case, and take the case under discussion out of the general principle then announced.

GURVIN v. CROMARTIE.

[11 IREDELL'S LAW, 174.]

MARRIAGE IS VALUABLE CONSIDERATION, and sufficient to support a contract, whether executed or executory.

PROMISE TO PAY ONE CERTAIN SUM IF HE MARRY AND HAVE ISSUE is valid, and can be enforced against the promisor after the marriage of the promisee and issue had.

Id.—PROMISE TO MARRY IS UNNECESSARY where one agrees to pay another a certain sum if he marry and have issue, and such a contract is not void for want of mutuality, but the promisee may recover upon it upon the happening of the contingency.

NO TIME BEING SPECIFIED IN PROMISE TO PAY SUM ON MARRIAGE of the promisee with issue, the promisee has his life-time in which to perform, and upon performance completed, can claim the compensation agreed on, unless, before any act done by him towards performance, the other party has retracted his offer.

HUSBAND IS PRESUMED TO BE FATHER OF WIFE'S ISSUE, when he cohabits with her.

LAND was devised to Gurvin in fee, with a limitation over in case he died without lawful issue surviving; Gurvin conveyed the land to Cromartie by deed of general warranty, and after the execution of the deed, the latter said to him: "Now, Charles, be smart and get a wife and have a child, and I will give you five hundred dollars." The plaintiff subsequently married, and Cromartie, upon hearing of it, said he was bound to pay the money should his wife have a child. Some years afterwards the wife had a child, and Cromartie being then dead, Gurvin demanded payment of his executor, and on his refusal to pay brought this action. The defendant's counsel insisted that there was no consideration for the promise; that the plaintiff had not assented to the contract; that the marriage and having of issue was not within a reasonable time; and that the plaintiff had not shown that he was the father of the child; and moved the court to instruct the jury that the plaintiff could not recover. The court refused the instruction; verdict and judgment for the plaintiff; the defendant appealed.

Strange, for the plaintiff.

W. Winslow, contra.

By Court, RUFFIN, C. J. It is not needful to consider of the benefit which the marriage of the plaintiff and the birth of issue might have been to the testator in preventing the estate, which he had purchased, from going over and making his fee absolute; since, without doubt, marriage is a valuable consideration, and sufficient to support a contract, whether executed or executory. It is generally the sole consideration on which marriage settlements are founded, and it sustains them against the creditors of the contracting parties and purchasers from them. It was so decided by Lord Clarendon, in *Douglasse v. Waad*, 1 Ch. Cas. 99; and in *Brown v. Jones*, 1 Atk. 188, Lord Hardwicke said that a settlement on the wife before marriage, though without a portion, is good—for marriage itself is a consideration. It is most clearly so; for by the marriage, the respective parties incur duties and obligations to or in respect of each other, and the one acquires in the estate of the other, or

loses in his or her own, certain rights, which are valuable in a pecuniary sense. So mutual promises between a man and woman to marry will sustain each other, and the party violating his or her promise is liable to the action of the other, as is often seen. In like manner a promise by one man to another to pay him so much in consideration that he will marry a certain woman is valid. The same reasons make it so, upon which a marriage settlement is upheld upon the consideration of the marriage. There are many cases of actions on collateral promises to one, in consideration that the promisee will marry a third person.

In *Browne v. Garborough*, Cro. Eliz. 63, the promise was to a woman, that if she would marry one R. B., and one J. B. should not assure to them certain land, then the defendant would pay her one hundred pounds, and the marriage took effect, and an action was brought thereon by the husband and wife. After verdict for the plaintiffs on *non assumpsit*, it was moved in arrest of judgment that there is no sufficient consideration, as the defendant was a stranger to the *feme*. But the court gave judgment on the verdict, giving as one reason, that it was intended the woman was induced by the promise to marry R. B., which otherwise she would not have done, and peradventure she trusted the defendant rather than J. B. *Bradley v. Toder*, Cro. Jac. 228, and *Berisford v. Woodroff*, Id. 404, are other instances in which similar actions were sustained. It is true that in those cases it happened that the person whom the plaintiff was to marry was a relation of the defendant, and that in *Browne v. Garborough*, some stress was laid on that circumstance. But it is quite clear that was not material; for it is not the benefit that may accrue to the promisor or his relation which constitutes the consideration in such a case, but the liabilities incurred by the person marrying and the effects the marriage may have on his or her estate, real or personal. Accordingly we find a precedent, 2 Went. 492, in which the declaration was on a promise to pay the plaintiff seven pounds, in consideration that he would marry one D. B., who then had a bastard; and there is another precedent, 2 Ch. Pl. 254, in which the declaration is on a promise to pay the plaintiff a sum named for marrying one E. F., without otherwise describing her, as of kin to the defendant, or as under any particular discredit or disadvantage.

In *Ex parte Cottrell*, 2 Cowp. 742, a person gave to another a bond to pay him certain sums by installments, in consideration that he would marry a woman, by whom the obligor had

several bastard children, and after the marriage had, the obligor became bankrupt, and the question was, whether the obligee could prove this debt under the commission. A case was sent out of chancery to the court of king's bench for the opinion of the court of law. The court interrupted the counsel for the creditor by inquiring what could be objected to the bond; and when the counsel on the other side contended that the debt could not be proved, because it was not founded on a good consideration, Lord Mansfield replied that the consideration was good between the parties, as it was a stipulation between them in consideration of marriage; the one having performed his part and married the woman, the other was bound to perform his. Those cases and precedents fully establish that a promise to pay a man for marrying a particular woman will maintain an action, after the marriage had.

It follows that a promise to pay him for marrying any woman, without designating one in particular, is likewise valid; for there is no perceptible distinction on which the law can give an action in the one case and not in the other. It was argued, indeed, that it might be a prejudice to one to marry a particular woman, and by possibility, in such a case, the man would not have married her, had it not been for the promise; whereas marriage generally is to be taken to be to the party's gratification and benefit, and when he is left at large to his own free choice, his marriage cannot be intended to be to his disadvantage; and therefore, that in this last case the marriage is not a sufficient consideration. But the distinction seems to be entirely untenable; for experience proves, even when the parties are of their own exclusive selection, marriages may or may not be judicious or happy. And it is just as much an act of prudence for a man to refrain from marrying any woman without having a competent livelihood for himself, his wife, and a family, as it is for him, under those circumstances, not to marry a particular woman. In either case, he may be induced to marry or not to marry by his having or not having a reasonable consideration. But the law does not inquire whether the party has or has not made a fortunate match, because it is not the adequacy of the consideration which determines the validity of the promise, but it is the doing of something by the party to whom the promise is made, and it is a familiar elementary principle, that such act, however trifling, constitutes a sufficient consideration. The act of marriage with any one woman must, in this point of view, be the same as that with any other; and therefore, as far

as the objection to the want of a consideration affects the case, the instructions to the jury were right.

It was next said that the plaintiff gave no such assent to this promise as amounted to a contract between the parties, on which the other party could have an action; and so it was void for want of mutuality. That is but presenting the last objection in another aspect, and therefore cannot avail. There are two modes of making simple contracts and declaring on them. The one is, when one party promises to do a certain thing, and in consideration of that promise the other party engages to do something on his part. Then, as nothing is done but the making of the promises, it is absolutely necessary that mutual valid promises, amounting to an express contract, should appear; otherwise, one of the parties might claim the benefit of the promise of the other, without in return doing any act or being liable for any loss whatever. And in such a case it is necessary only to set out the mutual promises, without averring performance on the part of the plaintiff. The other mode is, when one party promises, in consideration that the other will or will not do some act. Then no mutual promise need be set forth or exist; but it is necessary and sufficient to show the act done. It is not requisite that it should appear the plaintiff might have been sued for not doing the act; for he may recover after the thing done, though it was at his election whether he would do it or not up to the moment of its execution.

Thus in an action on a promise to pay the debt of another in consideration of forbearance, the declaration sets forth no agreement of the plaintiff to forbear, but only the promise of the defendant to pay upon the consideration of forbearance for the particular time, and then, that the plaintiff, confiding in the defendant's undertaking, did forbear during the prescribed period. In like manner are framed the precedents upon promises to pay one for marrying a particular person. They set forth that in consideration that the plaintiff, at the instance of the defendant, would marry A B, the defendant promised the plaintiff to pay, etc., and that the plaintiff, confiding in the promise, afterwards married, etc. In no instance is there an averment, or is it set forth as a part of the consideration, that the plaintiff agreed to marry, excepting only when the action is between a man and woman for breach of promise to intermarry. The declaration alleges merely that the plaintiff in fact married, and that thereupon the action arose upon the defendant's promise. For, in all such cases, it is the intend-

ment of the law that the marriage was induced by the promise, and therefore it is not necessary to aver or prove that it was done at the instance of the defendant: *Berisford v. Woodroff*, Cro. Jac. 404; *Poynter v. Poynter*, Cro. Car. 194; *Bockenham v. Thacker*, 2 Vent. 71.

There is, however, another case, which presents a remarkable instance of the validity of a promise by one person to pay a sum of money for an act done by another, when no other person is or can be found to do the act, and the right to claim the benefit of the promise arises simply from the performance of the act by any person and without any previous communication with the defendant. It is that of a promise of a reward for apprehending a felon, discovering lost goods, or the like; in which the promise is deemed to be a continuing one, and to be binding in favor of any person who afterwards acts upon it: *Williams v. Carwardine*, 5 Car. P. 566, and S. C., 4 Barn. & Adol. 621. And the precedents of declaration upon such offers of reward aver merely that the plaintiff, upon the faith of the offer, did the service, and that the defendant had notice thereof: 3 Went. 30. It was not necessary, therefore, that the declaration here should have averred more than it has, or that there should have been any engagement by the plaintiff to marry, in order to entitle the plaintiff to recover upon his marriage and the birth of a child.

As to the objection that these things were not done in a reasonable time, there is nothing in it. The contract specified no time within which the marriage and birth of issue should occur; and from their nature, the party had his life-time to perform them, and upon performance completed, could claim the compensation agreed on—at least, unless, before any act done by the plaintiff towards performance, the other party had retracted his offer.

The last ground of exception was, that the plaintiff did not prove that he was the father of his wife's child; and to that was added here, that an inquiry on that point would be indecent, and therefore, also, that the promise ought not to entitle the plaintiff to an action. The answer is, that there is legal evidence of the paternity of the child; as it is matter of law that the husband who cohabits with his wife—and nothing to the contrary was suggested—is presumed to be in fact the father of the wife's issue. Then, as to the notion of the indecency of investigating an inquiry into the legitimacy of the issue, it seems to the court to be entirely unfounded. This is not a case of a wager between two persons upon a question

involving the feelings of others, or naturally calculated unnecessarily to produce indecent inquiries. On the contrary, it is a promise to pay one a certain sum in consideration of marrying and having issue of the marriage; which is a very common contingency, upon which estates devised are enlarged or defeated, and it is also a contingency on which almost all the limitations in marriage settlements depend. They can offend the feelings or delicacy of no one, but are contingencies naturally connected with the proper provisions for a family, and therefore they almost always give rise to important limitations in settlements. The present is a transaction much of the same nature; whereby the plaintiff, who was single at the time, was to become entitled to demand a particular sum from the testator upon his future marriage and the birth of issue.

Judgment affirmed.

MARRIAGE IS VALUABLE CONSIDERATION: *Dugan v. Gittings*, 43 Am. Dec. 306, and note.

PRESUMPTION IN FAVOR OF LEGITIMACY OF CHILD BORN IN WEDLOCK: See *Eloi v. Mader*, 38 Am. Dec. 192, and note.

PLATT v. POTTS.

[11 IREDELL'S LAW, 263.]

TROVER WILL NOT LIE FOR CONVERSION OF JUDGMENT.

TROVER WILL NOT LIE FOR NOTE AFTER JUDGMENT RENDERED ON IT, as the note then has no existence.

APPEAL from the Haywood county superior court. The opinion states the case.

N. W. Woodfin, for the plaintiff.

Henry and J. W. Woodfin, contra.

By Court, PEARSON, J. This was trover. One count was for the conversion of a magistrate's judgment for one hundred dollars against one Tulbright; the other was for the conversion of a note for one hundred dollars on said Tulbright. The proof was that Tulbright had given the plaintiff a promissory note for one hundred dollars. The plaintiff, by his agent, indorsed the note to one Allen in anticipation of a trade, which was not concluded, and the plaintiff then handed the note to the defendant Potts, a constable, for collection, without striking out the indorsement to Allen. Potts took a judgment against Tulbright on the note, and afterwards sold the judg-

ment to the other defendant Penland. The defendants, upon demand, refused to give up to the plaintiff either the note or the judgment; he then brought this action.

The judge in the court below was of opinion that the plaintiff could not recover on the first count, because "a judgment" of a magistrate was not a thing that could be recovered in trover. This is settled: *Cobb v. Cornegay*, 6 Ired. L. 858 [45 Am. Dec. 497]. But he was of opinion that the plaintiff could recover for the conversion of the note, "if the jury was of opinion that there had been a conversion of the note by the defendants; either by procuring a judgment to be rendered on it, or otherwise." To this part of the charge the defendants except, and we think the exception well founded.

There was no wrongful conversion of the note by taking a judgment on it in the name of Allen. The indorsement passed the legal interest to him, and it was the plaintiff's fault not to strike out the indorsement, and, although the beneficial interest, according to the facts of the case, was still in the plaintiff, the defendant, Potts, did nothing more than his duty in taking the judgment as he did. The judgment nullified the note, and it was, therefore, of no force or effect, and ought to have been canceled by the magistrate and filed away by him, and, in strictness, he ought also to have kept the judgment (or rather the paper on which the judgment was written), as evidence of his adjudication, in which both the plaintiff and the defendant were interested, but to which neither of them had any right, because it ought to be kept by the magistrate, so as to enable him to make a due return if a writ of *recordari* should issue. The rights of the plaintiff could be enforced by issuing an execution on a separate piece of paper, and the rights of the defendant (if he should ever be sued again for the same cause), could be protected by a reference to the judgment, etc., still remaining in the hands of the magistrate, as a *quasi* record.

We, therefore, do not concur in the opinion that a note, after a judgment has been rendered on it in the name of the apparent legal owner, can be the subject of an action of trover. A judgment is a thing merely in contemplation of law, and trover will not lie for its conversion, whether it be the judgment of a court of record or of a magistrate. A note, after judgment has been taken on it, is defunct, has no existence, and is not a thing, either in fact or in contemplation of law, and therefore trover cannot be sustained.

Judgment reversed, and *venire de novo*.

MERGER OF DEED IN JUDGMENT RECOVERED THEREFOR: See *Wann v. McNulty*, 43 Am. Dec. 58, and note.

TROVER WILL LIE FOR JUDGMENT rendered by a justice of the peace: *Hudspeth v. Wilson*, 21 Am. Dec. 344.

DEN EX DEM. LYERLY v. WHEELER.

[11 IREDELL'S LAW, 203.]

PLAINTIFF IN EXECUTION SEEKING TO ESTABLISH SHERIFF'S DEED, under which he claims, must produce not only a copy of the decree, but also the bill and answer, and so much of the pleadings and orders as would show that the decree was pronounced in a cause properly constituted between the parties.

IN EJECTMENT BROUGHT BY PURCHASER AT SHERIFF'S SALE against the defendant in the execution, the latter, while still in possession, cannot resist upon the ground that he, the defendant, has acquired a better title. **PURCHASER ACQUIRES WHATEVER POSSESSION DEFENDANT IN EXECUTION HAD**, and is entitled to recover it in an action of ejectment.

APPEAL from the Rowan county superior court. The opinion states the case.

Craig, Osborne, and Alexander, for the plaintiff.

Boydton, contra.

By Court, NASH, J. Two questions are presented by this case to the consideration of the court. The plaintiff claims title under a sheriff's deed, and to establish it, offered in evidence a copy of a decree in equity made in the supreme court in his favor against the defendant. The introduction of this evidence was opposed by the defendant, for the reason that copies of the bill and answer, filed in the case, ought also to be in evidence. The court admitted the evidence. In this, we think, there was error. The opinion of the court below was endeavored to be sustained here, upon the act of 1848, chapter 53, passed, as it declares, "to secure the title of purchasers of land sold under execution." It provides that "when lands had been sold or might be hereafter sold, by virtue of any writ of execution, etc., no variance between the execution and the judgment, whereon it issued, etc., shall invalidate the title of the purchaser." In the case of *Rutherford v. Raburn*, 10 Ired. L. 148, the court decided that the effect of that act is to restore the common law on that subject. By the common law, the execution not only justified the sheriff in acting under it, but the purchaser at the sale, in an action against the defendant in the execution, or one coming in under him after the lien attached, need not show the judgment. A contrary rule was established in this state by the case of *Hamilton v. Adams*, 2

Murph. 161, and was considered the law until the passage of the act above mentioned. In *Rutherford v. Raburn*, *supra*, however, the court restrained the operation of the act to cases where the purchaser is not the plaintiff in the execution. When he is, he must show a judgment, not to show that there is no variance between it and the execution, but that the plaintiff had a just claim against the defendant and it had been ascertained by a judgment; and to this, the case of *Lake v. Billers*, 1 *Ld. Raym.* 783, is cited.

If it was necessary, then, for the plaintiff to produce a copy of the decree in equity, which we hold to be the law in such a case, the copy of the decree alone will not answer. To make it evidence, it was necessary for him to have the bill and answer and so much of the pleadings and orders as would show that the decree was pronounced in a cause properly constituted between the parties: *Doe ex dem. Williamson v. Bedford*, 10 *Ired. L.* 198. Another question was presented by the case, the decision of which is not necessary to the disposition of the case at present, yet, as it must be presented to another jury, and may again arise, to save time and trouble, we proceed to give our opinion upon it. The defendant offered to prove, that before the decree offered in evidence was obtained, he conveyed the land in dispute to one Locke in trust to secure his indorsers to a bank debt which he owed, and that the said trustee, on the twenty-third of November, 1846, had sold the premises at auction to one Nathan Chaffin, to whom he made a conveyance and who leased the land to him and under whom he now held it. This evidence was rejected by the court. In an ejectment brought by a purchaser at a sheriff's sale, against the defendant in the execution, the latter, while still in possession, cannot resist upon the ground that he, the defendant, has a better title.

The action of ejectment is to recover possession, and whatever possession the defendant in the execution had, the purchaser acquires by the sale, and is entitled to recover: *Den ex dem. Thompson v. Hodges*, 3 *Murph.* 546; *Islay v. Stewart*, 4 *Dev. & B. L.* 160. Our attention in the argument was called to *Jordan v. Marsh*, 9 *Ired.* 234. This opinion is not in conflict with it. It was decided on its own peculiar features. The land had been sold under executions against the defendant for different persons, to one of whom he was considered as having surrendered the possession, and he took a new lease after the last sale by the sheriff.

Judgment reversed, and *venire de novo*.

DEFENDANT IN POSSESSION CANNOT DENY TITLE OF PURCHASER AT EXECUTION SALE: *Switzer v. Skiles*, 44 Am. Dec. 723; and cannot in general make any defense against the judgment purchaser in an action of ejectment brought by him: *Snively v. Wagner*, 45 Id. 640. But the defendant in execution may resist recovery by the purchaser, unless the latter can show a valid execution: *Den ex dem. Smith v. Fore*, 51 Id. 376.

PURCHASER AT EXECUTION SALE, WHAT MUST SHOW TO BE ENTITLED TO POSSESSION: See *Owen v. Barksdale*, 47 Am. Dec. 348, and note; *Carson v. Doe ex dem. Huntington*, 45 Id. 273; *Ferguson v. Miles*, 44 Id. 702; *Bybee v. Ashby*, 43 Id. 47; *Blanchard v. Blanchard*, 38 Id. 710; *Ware v. Bradford*, 36 Id. 427.

THE PRINCIPAL CASE WAS CITED to the point that wherever a judgment at law or decree in equity was offered in evidence, it is requisite to set forth so much of the pleadings and orders as to show that the one was pronounced and the other given in a cause properly instituted between the parties, in *Stallings v. Gully*, 3 Jones L. 346.

McPHERSON v. MCPHERSON.

[11 IREDELL'S LAW, 381.]

THERE ARE TWO JUDGMENTS IN ACTION OF ACCOUNT: first, that the plaintiff and defendant account together; and second, that the plaintiff or defendant recover the balance found to be due.

IN ACTION OF ACCOUNT AGAINST CO-TENANTS it is error to require, as a preliminary question before the first judgment, that the plaintiff and defendant account together, is given, that the plaintiffs should prove to the jury that the defendant has received more than a just share of the profits.

EVERY TENANT IN COMMON IS LIABLE TO ACCOUNT who has been in the enjoyment of the property, but no recovery can be had against him unless, upon taking the account, it is shown that he has received more than his just share.

JUDGMENT WILL NOT BE REVERSED FOR ERRONEOUS INSTRUCTIONS IF NOT PREJUDICIAL; therefore, a judgment will not be reversed on behalf of the plaintiff for an erroneous qualification of an instruction in his favor if the instruction itself was erroneous.

TWO TENANTS IN COMMON CANNOT JOIN IN ACTION OF ACCOUNT against their co-tenants, as the interest of tenants in common is several.

TENANTS IN COMMON CANNOT BE SUED JOINTLY IN ACTION OF ACCOUNT by their co-tenants, where each of the defendants received portions of the profits severally.

DEFECT OF PARTIES MAY BE TAKEN ADVANTAGE OF IN ACTION OF ACCOUNT by two tenants in common against their co-tenants, under the plea that the defendants are not the bailiffs of the plaintiffs in the manner alleged in the declaration.

VARIANCE BETWEEN ALLEGATA AND PROBATA IN ACTION OF ACCOUNT by tenants in common against their co-tenants is a ground of nonsuit.

ACCOUNT brought by the plaintiffs, tenants in common, against the defendants, their co-tenants. The questions of law raised appear from the opinion. Verdict and judgment for the defendant; plaintiff appealed.

Banks, Mullins, W. Winslow, and Kelly, for the plaintiffs.

Strange, contra.

By Court, PEARSON, J. The judge in the court below was of opinion that in the action of account against the defendants, who were tenants in common with the plaintiffs, and were sued as bailiffs under the statute, for using more than their just share, in proportion, of the profits, it was necessary for the plaintiffs to prove to the satisfaction of the jury, not only that the defendants were tenants in common with the plaintiffs, and had been in the pernancy of the profits, but that they had received more than their just share or proportion. To this the plaintiffs excepted. We think there is error.

The action of account is peculiar, for in it there are two judgments: in the first place, there is judgment that the plaintiff and defendant account together; and in the second place, that the plaintiff or defendant recover the balance found to be due.

The first judgment, like an order of reference to the clerk to take an account in equity, merely decides that the plaintiff is entitled to an account; it can only be barred by proof that the defendant had already accounted, or by a denial, uncontradicted by proof on the part of the plaintiff, of the existence of any such relation between the parties as gives the plaintiff a right to call for an account.

To require, as a preliminary question before the first judgment is given, that the plaintiff should prove to the jury that the defendants have received more than a just share of the profits, is totally inconsistent with the nature of the action, for three reasons: 1. It will require the plaintiff to prove to the jury the very thing that is to be decided by the auditor, and leaves nothing for him to do; 2. It will require the jury to investigate and decide matters of account, which the mode of proceeding in this action presupposes a jury is incapable of so doing; 3. It will deprive the parties of the right given by the statute, of an examination on oath touching the matters in question.

Every tenant in common, who has been in the enjoyment of the property, is liable to account, but no recovery can be had against him, unless, upon taking the account, it is shown that he has received more than his just share. The mode of enjoyment is not material. It makes no difference whether he uses it merely for shelter and as a means of supporting himself and

family, or makes money by selling the products, or receives money as rent; in either case, he is bound to come to an account with his fellows, and can only avoid it by averring, and proving, that he has already accounted.

The defendants' counsel earnestly contended that it was a hardship to be subjected to a judgment to account, without proof in the first instance that more than a just share had been received, and that no tenant is safe in taking possession, if, by doing so, he subjects himself to the trouble and expense of an account. We are unable to perceive the force of the argument. If a bill is filed against an executor, or an agent, or a tenant in common, who has been in the perception of the profits, it would be strange if the plaintiff was required, in the first instance, to prove that the defendant is in arrear. That is the very question to be settled by taking the account, and if the plaintiff fails to establish it before the master, he pays the costs of the suit.

We think, therefore, there is error in the part of the charge excepted to by the plaintiffs, but it is apparent from the case that they have not been prejudiced by the error. The part of the charge excepted to is a restriction or qualification of a general proposition, that the plaintiffs were entitled to recover. There is manifest error in this general proposition, in favor of the plaintiffs, and of course an error in the restriction or qualification of an erroneous proposition could work no prejudice. The charge ought to have been that the plaintiffs were not entitled to recover; this would have cut off the question raised by the exception.

The action is fatally defective, by means of a misjoinder, both of plaintiffs and defendants. The plaintiffs declare, not upon an express understanding with them jointly, but upon the implied understanding raised by the statute. Now, the interest of tenants in common is several, and, of course, this implied understanding with them must also be several—so their right of action is not joint, and there are too many plaintiffs, which is a fatal variance. In regard to the defendants, there is no proof that they received the profits jointly as partners. Each received portions of the profits severally, and therefore they cannot be sued jointly, for in that case each would be bound for the whole judgment, and if the defendant who had received the greatest share happened to be insolvent, the burden would fall on the others. The principle is the same as that applicable to co-sureties. If one of them pays the debt, he cannot, at law, sue the other two jointly; for each is only liable for his

aliquot part, and to allow a joint suit would be to subject one to the whole recovery, although his fellow may be insolvent: *Powell v. Matthis*, 4 Ired. L. 83 [40 Am. Dec. 427]. It was ingeniously argued for the plaintiffs that there was no plea under which advantage could be taken of the defect of parties, and he cited a passage, 1 Chit. 14, where it is said: "A variance in respect to parties can only be a ground of nonsuit under the plea of *non est factum*, in debt on specialty and covenant; and the general issue in all other actions." It is clear Chitty has no reference to the action of account, which he considers obsolete, and therefore does not treat of it—and in which, like covenant, there is, properly speaking, no general issue. As in the latter, the variance may be taken advantage of under *non est factum*, so in the former it may be done, under the plea that the defendants are not the bailiffs of the plaintiffs in the manner alleged in the declaration. Both of these pleas deny the relation between the parties as alleged; and if, upon the trial, there is a variance between the *allegata* and the *probata*, it is ground of nonsuit. If the plaintiffs will not submit to a nonsuit, the court must instruct the jury to find for the defendants.

Judgment affirmed.

ACCOUNTING BETWEEN CO-TENANTS: See *Ruffners v. Lewis's Ex'rs*, 30 Am. Dec. 513. The language of the principal case, in reference to the liability of co-tenants to account, was quoted in *Roberts v. Roberts*, 2 Jones Eq. 131.

JOINDER OF TENANTS IN COMMON, in actions by or against or between them: See *Malcolm v. Rogers*, 15 Am. Dec. 464; *Laky v. Holland*, 50 Id. 705; *Maxwell v. Maxwell*, Id. 657.

MISJOINDER, DEFENSE OF, WHEN MUST BE TAKEN AND WHEN WAIVED: See *De Louis v. Meek*, 50 Am. Dec. 491, and note citing the previous cases in this series.

ACTUAL OR PROBABLE INJURY FROM ERRONEOUS INSTRUCTIONS must appear to warrant a reversal of a judgment: See *Johnson v. Evans*, 50 Am. Dec. 609, and the cases cited in the note; see also *Gibbons v. Dillingham*, Id. 233, and note; *Noyes v. Shepherd*, Id. 625; see also *Shorter v. People*, 51 Id. 286.

DEN EX DEM. MURRELL v. ROBERTS.

[11 IREDELL'S LAW, 424.]

LESSOR IS NOT ESTOPPED TO DENY TITLE IN LESSOR when, during the lease, the premises are sold under execution against the lessor, and the lessee becomes the purchaser.

PAYMENT TO SHERIFF DISCHARGES EXECUTION.

SUBSEQUENT SALE UNDER SATISFIED EXECUTION IS VOID, and the purchaser at such a sale obtains no title.

EJECTMENT by a lessor, claiming that the lessee, during the continuance of the lease, sold the premises to one Dudley, under whom the defendant claimed. The defendant offered evidence showing that the premises had been sold under a *fi. fa.* against the lessor, and that the lessee had become the purchaser, subsequently to which he had made the conveyance alleged. The plaintiff objected to this evidence on the ground that the lessee was estopped to deny the lessor's title or to withhold possession from him on the expiration of the lease, and that those claiming under him were also estopped. The objection was overruled. The plaintiff then offered evidence to show that before the sheriff had the *fi. fa.* in his hands, the whole sum due on it had been paid to him in satisfaction of it; but defendant objecting, the evidence was ruled out, on the ground that it was incompetent to so impeach the title of a purchaser at sheriff's sale. Verdict and judgment for the defendant; the plaintiff appealed.

Strange, for the plaintiff.

No counsel *contra*.

By Court, RUFFIN, C. J. There is no error on the first point. The defendant did not attempt to set up a title, in derogation of that of the lessor of the plaintiff, at the time of his lease to Smith. On the contrary, he acted in affirmance of that title, by showing the subsequent acquisition of it by Smith, so that both the term and the reversion became united in him. If the lessor of the plaintiff had, by his deed, assigned the reversion to Smith, the title thus derived might be set up as a bar to this action. It must be the same under the sale by the sheriff; for a reversion in fee, after a term for years, is the subject of execution, and the sheriff's deed is as effectual to pass it as that of the reversioner. On the other point, however, the court holds that there is error. Payment to the sheriff discharges the execution. If the sheriff have a *ca. sa.*, and after payment by the debtor, within his knowledge, he, the sheriff, arrest him, it is undoubtedly false imprisonment. It must also be illegal to act on a *fi. fa.* after satisfaction to the sheriff, and he is a trespasser if he seize goods afterwards: *Lefans v. Moregreen*, 1 Keb. 655. As was said in the case cited at the bar, the execution became thereby *functus officio*: *Hammatt v. Wyman*, 9 Mass. 138. It follows that a subsequent sale under it is void, and it was so held in that action, which was trespass by the purchaser at that sale, for a second taking of the goods, upon another execution against the same defendant. If it were not

so, the sheriff might, upon another execution for a trifling sum, ruin any person, since he might raise the money over and over again by sale after sale. For there is no difference between satisfaction by a payment by the debtor in money and one by the sale of his property. After satisfaction to the sheriff in either way, he cannot lawfully seize and sell property, more than he could without having had an execution at all.

Judgment reversed, and *venire de novo*.

TENANT NOT ESTOPPED TO DENY TITLE OF LESSOR, WHEN: See *Niles v. Bangford*, 51 Am. Dec. 95; *Melvin v. Proprietors*, 38 Id. 384; *Swift v. Dean*, 34 Id. 693; *Heath v. Williams*, 43 Id. 265.

EXECUTION SALE UNDER SATISFIED JUDGMENT, EFFECT OF: See *Doe ex dem. Reynolds v. Ingersoll*, 49 Am. Dec. 57, and cases cited in the note; *Bank of Utica v. Mercereau*, Id. 189.

PAYMENT OF EXECUTION TO SHERIFF DISCHARGES IT: See the cases cited in the note to *Morris v. Lake*, 48 Am. Dec. 724; *Boas v. Updegrove*, 47 Id. 425; see also *Welch v. Frost*, 48 Id. 692. The principal case was cited in support of this proposition, and quoted in *Halcombe v. Loudermilk*, 3 Jones L. 492, and regarded in *State ex rel. Brooks v. Gibbs*, 2 Id. 326, as an authority for the position that if the defendant in execution pays it and the sheriff does not return the writ nor pay the money over, and a second execution for the same debt issues, a sale of the defendant's property under the second writ would be void, and the purchaser would acquire no title.

THE PRINCIPAL CASE WAS ALSO CITED in *State v. Martha Queen*, 66 N. C. 617, and referred to on the point that where an execution was levied on land in which the defendant had no legal or equitable title, and the plaintiffs in the execution became bidders, their judgments were satisfied to the amount of their respective shares of the money bid, in *Wall v. Fairley*, 77 Id. 107. In *Kennedy v. Dunklee*, 1 Gray, 65, it was held that an execution issued while the judgment debtor was imprisoned under a commitment on a prior execution upon the same judgment, was void, and sale of property under it, although made after the debtor's discharge from imprisonment, and to a purchaser without notice, was void, and passed no title, citing the principal case.

DOE EX DEM. WILLIAMS v. HARRINGTON.

[11 IREDELL'S LAW, 616.]

COURTS OF EQUITY HAVE GENERAL JURISDICTION TO DISPOSE OF INFANT'S LANDS for their benefit in this state.

DECREE OF COURT OF EQUITY ORDERING SALE OF INFANT'S LANDS CANNOT BE QUESTIONED in another court, although there may have been irregularity or even error in the decree.

DEFECT IN DECREE OF COURT OF EQUITY FOR SALE OF INFANT'S LAND as to the certainty of the land is cured by the subsequent proceedings taken in the sale, and the ratification of the sale, whereby it appears that there could not have been a mistake as to the identity of the land intended and ordered to be sold, and that actually sold.

SUBSTITUTION OF ONE BIDDER FOR ANOTHER on a sale under a decree in equity of an infant's land by the express leave of the court, and after payment of the whole price, is proper.

EJECTMENT. The premises in question descended to the plaintiff, while an infant, from his father's estate; by a decree of the court of equity of Moore county, they were sold, and three persons were the highest bidders for the defendant; and the money having been paid, the court ordered a deed to be made to Harrington, purporting to convey the premises. The records of the court having been burned, evidence was offered by both parties as to the regularity of the proceedings. The plaintiff contended the defendant had no title under the deed, because the decree did not recite the facts, and did not particularly describe the lands to be sold—evidence on this point is stated by the court—and for other reasons not necessary to mention; and also insisted that as the defendant was not the purchaser, the clerk and master had no authority to convey to him, and consequently the deed was inoperative. The court ruled that none of the objections contended for invalidated the deed, and the jury found for the defendant. The plaintiff appealed.

Strange, Reid, and Mendenhall, for the plaintiff.

Winston, sen., Haughton, Kelly, and H. W. Miller, contra.

By Court, RUFFIN, C. J. Most of the objections are untenable in themselves. But without considering them in detail, there are some general considerations which apply to them all and show that they cannot detract from the defendant's title. It is not necessary to go back further than our own statutes to find a general jurisdiction vested in the courts of equity of this state to dispose of the land, as well as the chattels, of infants for their benefit. Those courts were constituted in 1782, with all the power and authorities of the court of chancery. By the act of 1762, the powers of the court of chancery, as to orphans' estates, are expressly saved.

Then, the act of 1827, after reciting that doubts had been entertained whether any court could direct a sale to be made by guardians of the real and personal estates of their infant wards, except in certain cases specified in two previous acts, and that the best interests of infants sometimes demand that such sales should be made in cases to which those acts did not extend, enacts, by way of remedy therefor, that on the application of a guardian by bill or petition, setting forth facts which, if true, show that the interest of the infant would be

materially promoted by the sale of any part of the infant's estate, real or personal, the court of equity shall cause the truth of the facts to be ascertained, and may thereupon decree that a sale be made by such a person, in such way, and on such terms, as the court in its wisdom shall adjudge. Then follow, in the next section, provisions that the sale shall not be deemed valid until it shall be ratified by the court; and that the court shall designate the person to make the title to the purchaser, and that no conveyance shall be made until the court shall order it—with a provision, also, for investing the proceeds of a sale. A jurisdiction over any subject could not be more extensive than that of the court of equity, as confessed or recognized by the statutes quoted.

If it were before doubtful, the act of 1827 thus confers upon the highest equitable tribunal known to our law full power to order the sale of the estates of infants, provided only that the court shall think it for the interest of the infant in any way whatever, as to pay debts, for partition, or more convenient management, or to produce greater profit, or any other purpose deemed beneficial by the court. In the exercise of that power, the acts of the court are, therefore, not to be regarded as those of a court not possessing a general jurisdiction over a subject, but only a special one to proceed on a particular subject for certain specified purposes and in a particular way. The cases of *Harriss v. Richardson*, 4 Dev. L. 279, and *Den ex dem. Leary v. Fletcher*, 1 Ired. L. 259, are contrasted examples of the difference between such general and special jurisdictions touching the very point now under consideration; namely, the powers of the court of equity and the county court to authorize a guardian to sell his ward's personal property (over which those courts have a general jurisdiction), and the special authority of the county court to order a sale of the infant's land under the act of 1789. That distinction is further illustrated by the case of *Jennings v. Stafford*, Id. 404; in which, also, the general rule is recognized, that the judgment or decree of a court having general jurisdiction over a subject-matter, subsisting unreversed, must be respected, and sustains all things done under it, notwithstanding any irregularity in the course of the proceedings or error in the decision.

Supposing, therefore, that there may have been irregularities or even error in the court of equity, still the decree cannot be questioned in a court of law for such causes. It is not for another court to arraign the decree, or the orders confirming the sale and for the conveyance to the defendant, upon such

grounds as that the guardian was not appointed by the proper court, or that there was not due advertisement or competent evidence of it, or that the interest of the infant was not promoted by the sale of the land, or that for any other reason it was not a proper case for a sale, or that the decree did not find the facts, which showed the sale to be beneficial. For all those matters were necessarily the subjects of consideration for the court of equity, and must have been passed on in the cause, before the decree or order could have been made. Having been judicially decided, it cannot be averred that they were not duly and rightly decided. It would be monstrous if the title of a purchaser under the decree—who paid his money to the court, and got his deed from the court, as it were—could be impeached upon any such grounds. Therefore, all the objections must fail upon the principles mentioned, unless it be those which insist on intrinsic defects in the decree or orders, as not being in themselves sufficient to authorize a sale of the premises in dispute and the conveyance to the defendant.

The court cannot suppose that the petition and decree did not describe the land more particularly than “as the lands of the deceased debtor lying in Moore county,” for no respectable counsel would draw pleadings nor the court decree in such terms. It was probably thus stated by the witness, because after the destruction of the papers they were unable to repeat the particular words, or do more than give the substance. But if it were otherwise, the decree, though less precise than usual, would not be so very vague as to be ineffectual, when taken in connection with the subsequent proceedings. It would then be as particular as a *fieri facias* on a judgment against heirs, which runs against the lands descended from the debtor, and they are identified by the sale and sheriff’s deed. Here, any defect as to the certainty of the land is cured by the report of the master of the sales of the several parcels and their ratification, and the order of the court to the master to convey this particular tract to the defendant. So it appears that there could not be a mistake as to the identity of the land intended and ordered to be sold, and that actually sold.

Cases were cited at the bar, in which the court of equity has refused to allow another person to be substituted for the purchaser reported; and it was thence inferred that the deed was not properly made to the defendant. Those cases seem to have been all proper, and this court agrees that, as a matter of wholesome practice, such a substitution ought not to be allowed be-

fore the payment of the purchase-money, nor, perhaps, without looking to the rights, even, of third persons as against the first purchaser—which is the whole extent of those cases. But although under those circumstances it may be against the course of the court of equity to discharge one bidder and take another, yet there is nothing in those cases intimating the idea of a defect of power to do so. In this instance, it was done by the express leave of the court, after the payment of the whole price, and an order was made for a conveyance to the substitute; and that it is conclusive.

It is competent to the legislature to direct the mode of transferring the legal title upon a judicial sale under a decree, as it is on one under execution at law. It was very meet that some mode should be provided, as the decree itself only constituted an equitable title, and conveyances could not commonly be got from the owners by reason of their disability. It is at present the province of the clerk and master *virtute officii*. But at the period of this transaction it was not. The act of 1827, however, is express, that a conveyance shall be made to the purchaser, when the court shall order it, and by the person who shall be designated by the court. It is certain, then, that the estate at law was intended to be transferred by a deed, to be executed under the direction of the court; and, in this case, the deed was thus executed, and, consequently, it passed the title to the defendant.

Judgment affirmed.

JURISDICTION OF CHANCERY OVER INFANTS AND THEIR ESTATES: See *Cocle v. Cocle*, 44 Am. Dec. 708.

DEGREE OF SALE OF INFANT'S PROPERTY, CONCLUSIVENESS OF: See *Hunter v. Hatton*, 45 Am. Dec. 117. The principal case was cited to the point that the regularity of proceedings in a court of equity could not be called in question in a court of law, but that that court is the exclusive judge of its own course, and its determination is conclusive as to every matter within its jurisdiction, in *Campbell v. Baker*, 6 Jones L. 258, and in *Harshaw v. Taylor*, 3 Id. 514, on the proposition that it was a well-established distinction, that where an authority or jurisdiction is general, the action of the tribunal upon whom it is conferred is taken to be within its authority or jurisdiction unless the contrary is shown; but where the authority or jurisdiction is special, in order to give effect to the action of the tribunal, it is necessary to show its authority or jurisdiction to do the act.

CASES
IN THE
SUPREME COURT
OF
OHIO.

STEWART v. STATE.

[19 OHIO, 302.]

It is proper to ask witness, in trial for murder, how he was employed during the few minutes that passed after he and the defendant came out of a house to where the deceased and others were standing, and before the fight took place in which the killing occurred, where the witness had testified as to what happened during that time on his direct examination.

Conduct of prisoner before killing is vitally important to the determination of the case, on a trial for murder in the second degree; it is therefore proper to ask a witness what the employment of the prisoner was from the time that he and the prisoner came out of a house to where the deceased with others was standing till the time the fight began in which the killing occurred.

Intent with which deceased and others went to prisoner's house on the night of the killing is important; and to ascertain it, it is proper to ask one of the persons who accompanied him as to the conversation that took place amongst them, while they were together, in relation to the subject-matter in dispute, and their purpose in going to the house.

Opinions of witnesses are not evidence as a general rule; the rule, however, is not universal, and a witness on a trial for murder may be asked whether, when the deceased rushed upon the prisoner, there was time enough for the prisoner to escape and get out of the way or not.

Error to the Clark county common pleas. The opinion states the case.

Anthony and Goode, and John A. Corwin, for the plaintiff in error.

William White, prosecuting attorney, and William Rogers, contra.

By Court, CALDWELL, J. It appears from the evidence in the case, that the deceased, Doty, on the evening he lost his life, in

company with three others, McCartney, White, and Jennings, went to Hagenbaugh's tavern, where the defendant, Stewart, boarded; that Stewart came out of the house onto the pavement, where the deceased and his company were standing; that an altercation ensued between the deceased and the defendant, about a small sum of money which the latter said the former owed him; that the deceased called the defendant a liar, to which the defendant replied that the deceased was a damned liar; that deceased then closed in upon defendant, that a fight ensued, that deceased very soon said he was stabbed, that he received several stabs, of which he died, and which were inflicted by defendant. It appears, too, from the evidence in the case, that after Stewart came out of the house, a few minutes intervened before the fight commenced. The state called Nathaniel Criger, who testified to the circumstances attending the affray, and also testified that he came out of the house with Stewart, the defendant. On cross-examination the defendant's counsel propounded the following question: "How were you employed, and how was the defendant employed, from the time you came out of the tavern till the fight began?" This question was objected to by the counsel on the part of the state, and the court sustained the objection, and would not permit the question to be answered. To this ruling of the court the defendant excepted, and assigned the same as error on the record. We see no objection whatever to the question. Indeed, we think, under the circumstances, it was one very proper to be asked. The witness had testified to facts that transpired between the time that he and Stewart came out of the house, and the time of the fight, as well as what happened during the fight. Now, to ask the witness how he was employed during the short interval before the fight occurred was a very pertinent question. It would tend to show whether the witness was situated so that he was able to note all that passed, whether his attention was directed solely to the parties, or whether he was engaged in anything else, that occupied a part of his attention; it might tend to cast light upon the distinctness of his recollection of what was going on, and in many respects might be important. As to the other branch of the question, we regard it, in this case, as of vital importance. The defendant was on his trial for murder in the second degree, of which he has been convicted. If the killing was the result of a sudden quarrel, he could not be convicted of murder. How vitally important, then, to the proper determination of the case, it was, to prove what his conduct was, when he came

out of the house, in the presence of the deceased and his party! Did he make any hostile demonstrations? Did he do any act that was calculated to bring on a quarrel, or do anything that showed that he wished to bring on a fight? Or did he engage in something that went to show no such disposition? What he did, or how he was employed, during this time, is a matter of so much importance that the case could not be properly tried without a scrutinizing inquiry into everything that was calculated to cast light upon it. We think the court clearly erred in not permitting this question to be answered. It would appear, from an interlineation in the bill of exceptions, that the question was objected to on the ground that it was not competent for the defendant to prove what Stewart did before Doty arrived. Now, the witness to whom this question was propounded does not state that Doty and his company were standing about the tavern when Stewart came out; but it is fairly inferable from what he says that such was the fact. But the first witness called by the state, McCartney, and the only witness that had been examined before Criger, the witness to whom this question was propounded, had stated in his examination in chief that Doty and his company were all standing about the tavern door, and gives the position of each when Stewart came out.

On the part of the state, a witness by the name of White, who was one of the four persons who were in company with Doty at the time of the fatal affray, and he having testified to the facts of the case, the defendant, on cross-examination, propounded the following question: "State what conversation took place on Monday evening, September 9, 1850, whilst McCartney, Doty, Jennings, and yourself were together, in relation to the subject-matter of dispute, between the defendant of the one part and Doty or McCartney, or either of them, on the other part, in relation to your going together to Stewart's boarding-house, and your purpose in going there." This question was objected to by the counsel for the state, which objection was sustained by the court, and the question was not permitted to be answered. This is assigned for error by the defendant. Several other questions were put by defendant's counsel, varying the form of the question, but substantially the same, which were also ruled out by the court. Now we think, under the circumstances of this case, as detailed in evidence, this was a proper question. It appears that on the Saturday evening before Doty and the same three persons, of whom the witness was one, had gone to this same house, that they and Stewart

had got into a quarrel; that Doty and two of the others rushed at Stewart, and that some other persons interfered to prevent the affray, and that Stewart escaped behind the counter. When the same persons went there on Monday evening, it certainly was important to prove whether they went there with a hostile intent or not.

Anything that would tend to prove whether they went there with a hostile intent, or whether they went with some different intent, or happened there casually, might be important evidence. This question, although embodying some circumlocution, was calculated to ascertain what these persons went to this house for on Monday evening; whether it had any reference to the existing quarrel between them and Stewart. If they had had any conversation, or had come to any agreement on the subject, it would be proper to prove it. If such had been the object of these persons in this visit that night, it ought to be proved, although no information of the kind had been, in language, conveyed to the defendant. He might be able, when they met, from their manner and conduct, to discover their intention, although they had made no verbal expression indicating such intention. An agreement to do anything or go anywhere is a fact; the conversation by which that agreement is made is the legitimate evidence of that fact, and does not in any way come under the head of hearsay evidence. Whether there was evidence to prove any such intention on the part of Doty and his friends is not the question; but whether the defendant might offer evidence tending to prove that fact. We think the court erred in not permitting this question to be answered.

The defendant called a witness, Harvey B. Corwin, and propounded to him the following question: "State whether, when Doty rushed upon Stewart, there was time enough for Stewart to escape, and get out of the way before Doty rushed on him, or not."

This question is rather in a leading form. It is, however, a question of that peculiar kind, that to call the attention of the witness to the precise point on which information is wanted, it is almost impossible to avoid putting the question in a form more or less leading. No objection is noted as being taken to the question on the ground of form, and the fair inference is that the question was ruled out as substantially incompetent. We think the question was proper, and should have been answered. This may be said to be taking the opinion of the witness, and therefore objectionable. It is true, as a general

rule, that the opinion of a witness cannot be given—the witness relating the facts from which the jury form their opinion. This rule, however, is not universal. The fact here sought to be proved, to wit, that the defendant could not avoid the conflict, could not be well proved to the jury by a statement of facts. The time occupied by the deceased in passing from where he stood to the defendant, a distance of only a few feet, could hardly be stated with any accuracy of measurement. The rapidity of his motion could not be calculated so as to convey any very definite idea of his velocity. The particular position of the defendant in reference to surrounding objects, as well as the position of his body at the time, were important items in determining the fact whether he could have got out of the way or not, and yet it would be very difficult, perhaps impossible, to convey any clear idea to the jury in reference to these matters. A variety of circumstances that could only be perceived, but not detailed, would constitute the aggregate from which the opinion would be formed. The person who had witnessed the transaction could alone, most probably, form any idea on the subject that could be relied on with safety.

For these errors the judgment of the common pleas will be reversed. The other points raised in this case are numerous, and some of them important, but we do not think it necessary to proceed further into the examination of the case.

DECLARATIONS OF WOUNDED PARTY TO SHOW INTENT with which he went to the house of the prisoner, is admissible in an indictment against the defendant for wounding him by a gun-shot: *State v. Goodrich*, 47 Am. Dec. 676.

OPINIONS OF WITNESSES AS EVIDENCE: See *Vandine v. Burpee*, 46 Am. Dec. 733; *Fisher v. Dodge*, 47 Id. 254, and note; *Commonwealth v. Eastman*, 48 Id. 596; *Cameron v. State*, Id. 111; *Donnell v. Jones*, Id. 59, and note; *Sikes v. Paine*, 51 Id. 389. In *State v. Rhoads*, 29 Ohio St. 171, it was held that in a criminal prosecution for assault and battery, where the defendant seeks to justify on the ground of self-defense, it is not competent to give in evidence the opinions of witnesses as to the existence of danger to life or of great bodily harm, or that such danger might have been reasonably apprehended by the defendant. The court cited and distinguished the principal case.

INGLEBRIGHT v. HAMMOND.

[19 OHIO, 337.]

OBJECTION TO COMPETENCY OF WITNESS ON ACCOUNT OF INTEREST must be taken at the time of his testifying, if the fact of interest was known, or if, by evidence afterwards offered in the case, the interest of the witness

should be apparent, the court should be asked to rule the evidence out; otherwise, the objection would not be available on appeal.

NEIGHBORHOOD REPORT IS NOT COMPETENT EVIDENCE TO PROVE PARTNERSHIP, without proving any act of the partners.

WHERE ONE CARRIES WHEAT TO MILL TO BE GROUND INTO FLOUR, the contract is not a sale, but the property in the flour is in the one depositing the wheat, although it is, with his knowledge, mingled with wheat belonging to the miller.

WHERE ARTICLES OF SAME KIND AND VALUE ARE MINGLED TOGETHER by the consent of the parties, each party is entitled to have divided to him as much as he may have put in, and is recognized in law as having a property in so much as he may have put into the common stock.

EVIDENCE OF CUSTOM MAY PROPERLY BE GIVEN TO EXPLAIN and give the proper effect to the contracts and acts of parties; but it is not admissible to change the title to property, contrary to an established rule of law.

PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN WRITTEN CONTRACT by which a miller agrees to do two hundred dollars' worth of grinding for the plaintiff, where the contract contains no terms on which the grinding was to be done, and to show whether the parties were governed by the stipulations contained in a previous similar agreement between them.

IF CHARGE ASKED EMBRACES SEVERAL DIFFERENT PROPOSITIONS, part of which is good and a part bad, the court may refuse the whole.

REPLEVIN. Hammond the owner of a mill, contracted for the sale of it to one G. A. Webb, and as a part of the consideration Webb agreed to do four hundred dollars' worth of grinding for Hammond within the next two years. The contract stipulated the terms on which the grinding was to be done minutely. The following year T. Webb, a brother of G. A. Webb, having joined him, a deed of the property was made to them both. Half of the grinding having been done, the Webbs executed a joint note by which they promised to do two hundred dollars' worth of grinding the next year. The note contained no stipulation whatever as to the terms on which the wheat was to be ground, and contained no reference to the previous contract. Early in the year the plaintiff brought a quantity of wheat to the mill, and with his knowledge this wheat was mingled with wheat belonging to the Webbs. The Webbs shortly afterwards absconded; at the time there was a considerable quantity of wheat in the mill, and they had left word with their foreman to grind it into flour for Hammond. In pursuance of these instructions, he ground a portion of the wheat into flour, and delivered it to Hammond, who removed it. In the mean while, the creditors, hearing of the absconding, had obtained judgments and levied executions on the property, and among other things upon this flour. This action of replevin was then brought against the sheriff. The instruc-

tions and rulings of the court and the exceptions thereto appear from the opinion of the court. Verdict and judgment for the plaintiff; the defendant appealed.

George W. Mason, for the plaintiff in error.

R. S. Moody, *contra*.

By Court, CALDWELL, J. The first error assigned on the record of the court of common pleas is, that the court erred in not ruling out the testimony of Daniel Hammond, he being an interested witness. This witness was called by Bezaleel Hammond, the plaintiff below, and testified in the cause. After his testimony was through, several witnesses were called, who gave evidence, tending to prove that he was a partner of said plaintiff, and had an interest in the property in controversy. The evidence to this point is strong. It does not, however, appear from the bill of exceptions that any objection was taken to his testifying. He was not interrogated as to his interest, nor does it appear that the court was asked to rule out his testimony. If the opposite party would avail himself, on error, on account of an interested witness being allowed to testify, he should, if the fact of interest were known to him, object to the witness testifying; or if by evidence afterwards offered in the case, the interest of the witness should become apparent, he should ask the court to rule it out. Nothing of this kind being done, it was not error in the court to permit the testimony of the witness to go to the jury, although he might have been interested.

It is alleged that the court erred in ruling out the testimony of John T. Leslie. This witness was called for the purpose of proving that Daniel Hammond was an interested witness. He testified that it was generally reported in the neighborhood that Bezaleel and Daniel Hammond were partners, but that he knew nothing about the matter of his own knowledge, nor had he ever heard anything respecting it from either of the Hammonds. We think the evidence was incompetent, and that the court acted properly in ruling it out. If the Hammonds, by word or deed, had held themselves out to the world as partners, that might have been proved; but the neighborhood report, without proving any act of theirs, was not competent evidence to prove that they were partners.

The defendant on the trial offered to prove that it was a custom amongst millers, that when a person took wheat to a mill, and consented to its being mingled with the miller's, that the property in the wheat passed to the miller. The court refused to admit this evidence. The custom offered to be proved

in this case was contrary, as we think, to the rule of law. Where an article of the same kind and value, which is calculated by the bushel or pound, is mingled together by the consent of parties, each party is entitled to have divided to him so many pounds or bushels as he may have put in—and is recognized in law to have a property in so much as he may have put into the common stock.

Evidence of custom may properly be given to explain and give the proper effect to the contracts and acts of parties; but it would be carrying the doctrine too far to permit a custom to change the title to property, contrary to an established rule of law. The court decided correctly in refusing to admit the evidence.

The court charged the jury that if wheat was delivered by Hammond to be ground by the Webbs, in payment of their two-hundred-dollar note, the property in the wheat, by such delivery, would not pass to the Webbs; that the two-hundred-dollar note did not in terms connect itself with the first agreement made between Bezaleel Hammond and George Webb, and that whether the Webbs, in performing their promise to pay two hundred dollars in grinding, as specified in their said note, were to be governed by the stipulations by the first agreement of Hammond and George Webb, was a matter to be determined by the jury from the evidence. They further charge that parol evidence was admissible to prove that fact, and as there was evidence on that question, that the jury would consider it in coming to a conclusion on the subject. We do not discover any error in this charge. The Webbs, in the two-hundred-dollar note, merely agreed to pay the amount in grinding. That grinding had to be done in a certain manner, and on certain terms. If no price was fixed before the grinding was done, then the Webbs would be entitled to receive credit for so much as the work was worth, and Hammond would be held to have impliedly promised to allow them that amount. Or the parties might agree upon what was to be ground, and the price allowed for the same, either verbally or in writing, and such agreement could be proved, by parol evidence, if verbally made, or by the written instrument, if reduced to writing. And if the wheat was delivered under both these contracts, the first fixing the price at which the grinding was to be done, and specifying the article to be ground, and the other specifying the quantity to be ground, such fact might be proved by parol; that it would neither be added to, contradict-

ing, or varying these written agreements. The one would still evidence how much was to be done, and the other the terms on which it was done. The parol evidence in that case would merely show the performance of these agreements. And as the court say there was evidence in the case, that was proper for the jury to consider in determining the question whether this wheat was delivered in performance of these two contracts. The court read a long extract from Story on Bailments, page 44 (on the subject of a mixture of corn, etc.), which they told the jury was good law, and applicable to the case on trial. This is assigned for error. As the extract is long, we do not intend to refer to it specifically. We would merely say that, as the court said in that case, we suppose it to be good law, and the evidence in reference to the mingling of the wheat certainly made it applicable to the case.

The court charged the jury that if they should find that the wheat in the mill was the property of the Webbs, and that the Webbs were indebted to Hammond, and that after the Webbs left, the wheat out of which the flour was ground was delivered over to Hammond in payment of his claim, against the Webbs, by a person authorized to do so, that the verdict should be for the plaintiff Hammond. This is assigned for error. We do not see any error in this charge.

The defendants asked the court to charge that they might look to the circumstances attending the delivery of wheat by the plaintiff, to ascertain whether such delivery was under and in performance of the note of January 26, 1847, or not. And that if the jury should find that there was an understanding or agreement, either expressed or implied, between the Webbs and the plaintiff, at the time the wheat was delivered by Hammond, that Hammond was to receive flour for it, without reserving flour to be made out of the specific wheat delivered, that a sale of the wheat and not a bailment was imported, and that such understanding might be inferred from the acts and declaration of the parties. This charge the court refused, which refusal is assigned for error.

Now the charge asked embraced several different propositions. A part, taken by itself, was no doubt good law, and proper to be given to the jury in the case—a part had already been given to the jury by the court. In determining, however, whether the court erred in refusing the charge, the charge must be taken as a whole. And the question, on error, for refusal to charge, is whether the whole charge asked was law, and proper to be given to the jury in the case. The

party presents his own ideas, in his own form, and asks the court to adopt them. If the court cannot adopt the whole, they may refuse the whole. There was one proposition embraced in this charge that we think was erroneous; and that was, that if Hammond was to receive flour for the wheat, unless such flour was made out of the specific wheat delivered, the jury should consider it a sale of the wheat, and not a bailment. We have already given our views of the law in reference to the mingling of wheat by the consent of the owners, or other articles admitting of a similar division. Each party retains the property in a quantity equal to what he has put into the common stock. Nor do we think that it necessarily alters the case that the party is to receive his return in flour, as is alleged in this case, at a barrel of flour for so many bushels of wheat. This is but another mode of dividing to the party his property in the flour, in which it was agreed by the parties it should be received. If so many pounds of flour was considered as equivalent to a bushel of wheat, then receiving flour at that rate would, to all intents and purposes, be the same as a division of the wheat. We think, then, that it was not necessary, to create a bailment, that the flour should be made out of the specific wheat delivered, and that the court did not err in refusing the charge. We do not discover any error in the record.

The judgment of the supreme court will be affirmed.

OBJECTION THAT WITNESS WAS PARTY CANNOT BE ALLOWED, unless it appears from the record that it was raised by way of exception in the court below: *Jones v. Hardesty*, 32 Am. Dec. 180.

GENERAL REPUTATION IS INADMISSIBLE TO PROVE PARTNERSHIP: *Grafton Bank v. Moore*, 38 Am. Dec. 478, and note discussing this subject; *Smith v. Griffith*, Id. 639.

DELIVERY OF WHEAT TO BE PAID FOR IN FLOUR, nature and effect of contract: See *Smith v. Clark*, 34 Am. Dec. 213, and cases cited in the note.

CONFUSION OF GOODS, EFFECT OF, ON TITLE: See *Hesseltine v. Stockwell*, 50 Am. Dec. 627; *Sims v. Glasener*, 48 Id. 120; *Hall v. Page*, Id. 235; *Willard v. Rice*, 45 Id. 226. Where a warehouseman receives wheat, and by the consent of the owner or in accordance with the custom of trade mixes the wheat in a common mass with the other wheat in his warehouse, and with the understanding that he is to retail or ship the same for sale on his own account at pleasure, and on presentment of the warehouse receipt is either to pay the market price thereof in money or redeliver the wheat, or other wheat in place of it, the transaction is not a bailment, but a sale, and the property passes to the depository, and carries with it the risk of loss by accident: *Chase v. Washburn*, 1 Ohio St. 244; the court cited and distinguished the principal case.

UNIFORM, KNOWN, AND ESTABLISHED USAGE IS BINDING on the parties if proved, and is presumed to be a part of the contract: *Farnsworth v. Chase*, 51 Am. Dec. 206, and note. See also *Littlefield v. Maxwell*, 50 Id. 653;

Knoc v. Rives, 48 Id. 97; *Desha v. Holland*, 46 Id. 261. The subject of customs and their validity is discussed at length in the note to *Governor v. Withers*, 50 Id. 95. The principal case was cited in *Foster v. Robinson*, 6 Ohio St. 97, 'as recognizing that the general doctrine that evidence of customs was admissible was applicable to bailments.

PAROL EVIDENCE TO EXPLAIN OR VARY CONTRACT, ADMISSIBILITY OF, generally: See *Moore v. Madden*, 46 Am. Dec. 298; *Campbell v. Upshaw*, Id. 75; *Groves v. Steel*, Id. 551; *Bank v. Fordyce*, 49 Id. 561; *Gibbons v. Dillingham*, 50 Id. 233; *Rearich v. Swinehart*, 51 Id. 540; *Ladd v. King*, Id. 624; *Pack v. Thomas*, Id. 135; *Piscataqua Bk. Bank v. Carter*, Id. 217.

WHERE PART OF INSTRUCTION ASKED IS GOOD AND PART BAD, the court may reject the whole, according to its merits as presented in its entirety: *Budd v. Brooke*, 43 Am. Dec. 321; see also *Whiteford v. Burchmyer*, 39 Id. 640. The principal case was cited to the point that it was not error to refuse to charge a proposition as required, if as a whole it did not state the law correctly, in *Tabler v. State*, 34 Ohio St. 133.

FISHER v. BUTCHER.

[19 OHIO, 403.]

ACKNOWLEDGMENT OF DEED NEED NOT BE TAKEN AT ANY SPECIFIED TIME; it is only necessary that the acknowledgment should be taken after the deed is executed; if it were made at any time between the making of the deed and the bringing of the suit, it would be good.

DATING ACKNOWLEDGMENT IN DEED BEFORE EXECUTION OF DEED does not invalidate the deed, and it is admissible in evidence, where the dating of the acknowledgment before was a mere clerical mistake, which the instrument itself sufficiently corrected.

DEPOSITIONS OBJECTED TO MUST BE EMBODIED IN BILL OF EXCEPTIONS, or must be made a part of the record, that the court may know what the testimony was, in order to determine whether there was error or not; otherwise, the objection will not be considered.

ERROR to the Cincinnati commercial court. The opinion states the case.

Thomas J. Strait, for the plaintiff in error.

Ball and Hoadly, contra.

By Court, CALDWELL, J. The action below was covenant upon a warranty contained in a deed from Fisher to Butcher. The declaration alleges the sale of certain lands in Newtown, Hamilton county, by Fisher to Butcher, the covenants of general warranty, freedom from incumbrance, etc., and by way of breach, eviction, by a title paramount.

On the trial, a bill of exceptions was taken to the rulings of the court, on which several errors have been assigned. The plaintiff in the court below offered in evidence the deed from

Fisher to Butcher. This was objected to by the defendant, on the ground that it was not properly acknowledged. The deed is dated January 6, 1842, and the certificate of acknowledgment on the sixth of January, 1840. The court overruled the objection, and admitted the deed in evidence, which is assigned for error. It is said that the dates proved that the acknowledgment was taken before the deed was made. If this were true, the acknowledgment would necessarily be invalid. We think, however, from an examination of the whole instrument, that it appears that this discrepancy in dates arises from a clerical mistake.

It is only necessary that the acknowledgment should be taken after the deed is executed. It is not important that it should be taken at any specified time. If it were made at any time between the making of the deed and the bringing of the suit, it would be good. It appears from the certificate that the deed was made at the time; it refers to it as the above conveyance, and certifies to an acknowledgment of the signing and sealing thereof. The paper itself sufficiently shows an acknowledgment of the deed after its execution, and that the contradiction of dates arises from a clerical mistake. An examination of the certificate will show how the mistake occurred. It is a printed form, with a blank after the word "forty," for the insertion of the units. This blank was omitted to be filled, and makes the date read "eighteen hundred and forty."

It being, then, a mere clerical mistake, which the instrument itself sufficiently corrects, the court were right in admitting the deed in evidence. The bill of exceptions states that the plaintiff also offered the "depositions of Samuel Wiggins, John Brockhart, and Uriah Birdsall, taken by consent of parties, saving only the competency thereof." These depositions were objected to by the defendant, on the ground that they were incompetent, inasmuch as they tended to prove a breach of seisin, not warranty.

These depositions are referred to as marked "(C)." They are not made a part of the bill of exceptions, nor do they purport to be attached to it, nor do we find any paper on file that would answer the description given in the bill of exceptions. There are no depositions of these persons named on file. We find a paper marked "(C)," indorsed on the back, "Agreed facts," which contains a memorandum of what Wiggins and the others state in reference to the matter, which it is agreed by counsel may be read to the jury, reserving the right to all

objections to competency. This is the only paper marked "(C)" on file. It does not answer the description of the paper referred to in the bill of exceptions; it is not made a part of the record. What the testimony was that was objected to we cannot judicially know, and therefore cannot determine whether the court erred or not; the question is not before us.

The other errors assigned depend on the alleged admission of this evidence. We cannot, from the bill of exceptions, determine that the commercial court committed any error, and therefore affirm the judgment.

BILL OF EXCEPTIONS MUST STATE WHAT: See *May v. Smith*, 45 Am. Dec. 548; *Brewer v. Strong*, 44 Id. 514; *Worton v. Howard*, 41 Id. 607; *Neal v. Sanderson*, Id. 609. See also *State v. Godwin*, 44 Id. 42; *Knowlton v. Culver*, 52 Id. 156.

LOCKWOOD v. MITCHELL.

[19 OHIO, 448.]

QUESTION TO BE DECIDED ON DEMURRER TO BILL IN EQUITY is simply whether the facts alleged in the bill would, if true, entitle the party complaining to relief.

EQUITY WILL RELIEVE AGAINST JUDGMENT OR DECREE OBTAINED BY FRAUD or circumvention of one of the parties, without the fault or negligence of the other.

MORTGAGEE OBTAINING DECREE OF FORECLOSURE BY FRAUD for a much larger sum than the amount due, equity will relieve against the decree without a tender of the amount due with legal interest.

BILL in chancery, alleging substantially that the complainant mortgaged certain real estate in Milan, Erie county, to the defendants, Mitchell and Crawford; that, pending the mortgage, the complainant, at the instance of his son James, was illegally confined in the Ohio insane asylum; that during his confinement the defendants began proceeding to foreclose the mortgage, and served the complainant while he was confined; that the complainant retained the Marvins as his attorneys, and they filed a bill in equity against the defendants in the state of New York, and obtained an injunction restraining the defendants from further proceedings; that the Erie county common pleas, on being served with copy of the proceedings in New York, ordered a stay of proceedings on the mortgage; that James Lockwood, the son, and the defendants, then entered into an agreement by which James was employed to collect the amount due on the notes and mortgages; that they

agreed upon an amount to be due which exceeded largely the real amount due; that by the agreement, James was to purchase the property, sell it from time to time during the term, discharge the mortgages, and pay the residue; that the Marvins dismissed the proceedings in New York, and James foreclosed the mortgage, became the purchaser, and conveyed to Mitchell and Crawford. The bill further alleges that the whole transaction was with the fraudulent intent of depriving the complainant of his property; that the Marvins had no authority to dismiss the proceedings in New York, and that the defendants knew this, but persuaded them to do it by means of false representations; that these proceedings all occurred while the complainant was confined, and consequently unable to defend his rights; that the decree of foreclosure was for a much larger sum than was really due; and that the value of the property sold was very largely in excess of the debt for which it was sold. The bill prays that the decree may be set aside for an accounting, that the principal and interest due be ascertained, after deducting what is usurious. The defendants demurred to the bill.

P. B. Wilcox, for the complainant.

Andrews, Mitchell, and Lane and Son, contra.

By Court, CALDWELL, J. This case comes before us on demurrer to the bill, consequently the question to be decided is, simply, whether the facts alleged in the bill would, if true, entitle the party complaining to relief in equity. In support of the demurrer, it is contended that the bill shows that a large amount of money was due on this mortgage, of principal and legal interest, at the time the decree of foreclosure was rendered, and that no tender being alleged, the bill is demurrable. If the bill was filed merely for the purpose of deducting the usurious interest, this objection would be well taken. Indeed, if usury were the only objection to the decree, it would be too late for the party to have even that rectified. The defense, to so much of the claim as might be usurious, could have been made in the former proceedings, and if the party either failed in proving it or neglected to make it, his right to assert it is now gone.

The bill, however, in this case, stands on much higher ground. If, as the bill alleges in this case, the complainant was, for a fraudulent purpose, confined in the lunatic asylum, and whilst thus situated, unable to defend his rights, Mitchell and Crawford, taking advantage of his helpless situation, com-

menced proceedings on a claim that was not due, with a fraudulent intent, and afterward, by fraud and deception, induced his attorneys to dismiss the proceedings, which were pending in New York, and which enjoined them from proceeding on their claim, knowing, at the same time, that those attorneys had no right to do so, and then took a decree for an amount much larger than was actually due, on which complainant's property was sacrificed, it would present a case of unmitigated fraud, attended with great injury to the person on whom it was committed; a fraud on the court rendering the decree, as well as on the complainant.

A decree or judgment receives its force from the fact that it is the decision of a competent tribunal, before which both the parties have had an opportunity of appearing and prosecuting their claims, and having them fairly adjudicated. When this is prevented by the fraud or circumvention of one of the parties, without the fault or negligence of the other, the decree or judgment of the court ceases to have its binding effect, and it is competent for the party injured to resort to a court of chancery to obtain relief.

The complainant has presented, as we think, a case that entitles him to relief by original bill; the demurrer will, therefore, be overruled.

EQUITY WILL RELIEVE AGAINST JUDGMENT OR DECREE FOR FRAUD: *De Louis v. Meek*, 50 Am. Dec. 491; *Bellamy v. Woodson*, 48 Id. 221; *Bank of Tennessee v. Patterson*, 47 Id. 618; *Pearce v. Chastain*, 46 Id. 423; see also *Stroup v. Sullivan*, Id. 389. The principal case was cited in *Conway v. Duncan*, 28 Ohio St. 105, to the point that it was a settled question that a judgment could be impeached for fraud.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

DENGLER v. KIEHNER

[13 PENNSYLVANIA STATE, 38.]

JUDGMENT CREDITOR MAY CALL BY SCIRE FACIAS ON TERRE-TENANT OF LAND purchased by him from the debtor, while it was bound by the judgment, to show why the debt ought not to be levied on it; and such terre-tenant, not appearing and making defense, is estopped thereby.

TERRE-TENANT IS PURCHASER OF ESTATE mediately or immediately from the debtor while it was bound by the judgment.

PURCHASER OF ESTATE AFTER JUDGMENT LIEN THEREON HAS EXPIRED is not estopped from showing title in himself by failure to appear to a *scire facias* upon such judgment.

EJECTMENT by Dengler and others against Kiehner. The plaintiff claimed under a deed from Jacob Dreibeldis to the ancestor of plaintiff, George Dengler, executed and delivered to said George Dengler after a lien on the land in question under a judgment against the grantor had expired by lapse of time. Defendants claimed under a sheriff's sale of the land in controversy and a sheriff's deed thereof, founded upon a *fieri facias* and *venditioni exponas* under the said judgment. Before issuing the *venditioni exponas* a *scire facias* issued on the said judgment, and was served on the said George Dengler, plaintiff's ancestor, as terre-tenant, who made no appearance thereto. An order of court reviving the judgment for another period of five years was made a few days after the execution of the sheriff's deed; but the *scire facias* had issued before the sheriff's sale. The main question involved in the suit was whether George Dengler, who had purchased the land in dispute after the expiration of the judgment lien thereon, and his

heirs, the plaintiffs in this suit, were estopped from claiming title in themselves unincumbered by such judgment lien, and the proceedings taken thereon, because of said George Dengler not having appeared and made defense to the *scire facias* served upon him. A copy of the record of a former ejectment suit by this defendant against George Dengler, in which the court held George Dengler concluded by his neglect to appear after due notice, was given in evidence: *Kiehner & Filbert v. Dengler*, 1 Watts, 424, 425. In the present case, the court relying upon the above-mentioned case, instructed the jury that the heirs of George Dengler occupied no better position than he did, and were therefore estopped in the same manner, and that the verdict, as a matter of law, should be in favor of the defendant. Such being the verdict, the plaintiff brought error.

Hughes, for the plaintiffs in error.

Loeser, for the defendant in error.

By Court, GIBSON, C. J. This case is simple in its elements. A judgment creditor has a right to call on a terre-tenant of land, purchased by him from the debtor, while it was bound by the judgment, to show why the debt ought not to be levied on it; and the terre-tenant having slipped his time, being warned, is concluded as to everything he might have made matter of defense to the *scire facias*. But the creditor must, at least, have laid a *prima facie* case; he must show that he whom he calls a terre-tenant actually stood in the relation of one; else there will not have been such privity between them as would estop the latter by the judgment. But who is a terre-tenant? Not every one who happens to be in possession of the land. There can be no terre-tenant who is not a purchaser of the estate, mediately or immediately, from the debtor, while it was bound by the judgment; and when he has taken a title, thus bound, he must show how the lien of it has been discharged, whether by payment, release, or efflux of time. These are matters of defense which may be precluded. True, we have a statute which directs notice to be given to occupants; but only to let the lessee of a terre-tenant into a defense, which his landlord may have neglected to make for his protection. The facts of this case are, that the estate had been bound by the judgment, but that the lien of it had expired when the ancestor of the plaintiffs purchased it. It had ceased to be a judgment of greater effect against the land than it was against the debtor's chattels; and the purchaser's title was paramount

to it. He was not a terre-tenant, nor a lessee of a terre-tenant; and as he had not a day in court, the judgment being *inter alios* was not an estoppel. The case is clearly within the principle of *Mitchell v. Hamilton*, 8 Pa. St. 486, and is ruled by it.

Judgment reversed, and *venire de novo* awarded.

SCIRE FACIAS, EFFECT OF JUDGMENT ON.—In *Irwin v. Nixon's Heirs*, 51 Am. Dec. 559, it is held that a judgment on a *scire facias*, reviving a judgment, is conclusive as to the existence of the debt, as respects innocent purchasers, though the original judgment was in fact satisfied, and the judgment reviving it was confessed by attorney without authority. See also cases cited in the note thereto.

TERRE-TENANTS, WHO ARE.—The principal case is cited as authority to the effect that a terre-tenant is one who is a purchaser, mediately or immediately, from the debtor, while the land is bound by the judgment, in *Fox v. Seal*, 22 Wall. 441; *In re Fulton's Estate*, 51 Pa. St. 212. In *Chahoon v. Hollenbeck*, 16 Am. Dec. 587, it is held that those only can claim as terre-tenants who became such by conveyance subsequent to the judgment.

LEWIS v. LEWIS.

[13 PENNSYLVANIA STATE, 79.]

ORPHANS' COURT IS STRICTLY COURT OF EQUITY within the limits of its jurisdiction.

DEVISEE OF ONE TRACT OF LAND ELECTING TO TAKE, by paramount title, another tract devised to another devisee, holds the legal title to the first tract, but is bound in equity as a trustee to compensate the disappointed devisee.

DEVISEE ELECTING BY PARAMOUNT TITLE ESTATE WORTH MORE than the one devised to him forfeits the devised estate, which may be recovered by the disappointed devisee in ejectment; although in a case purely for compensation, towards which, and not towards forfeiture, as a general principle in such cases, the weight of authority decisively inclines, the remedy would be by sequestration.

EJECTMENT by Charles Lewis and the heirs of Richard Lewis against Thomas Lewis, his children, and remaindermen, brought to recover one hundred and four acres of land in Plumstead township. In a special verdict rendered the jury found as follows: That both plaintiffs and defendants claim under the will of John Lewis; that said decedent, by his will, devised two farms, one in Buckingham township, the other in Plumstead township; that the former was devised to his sons Charles and Richard Lewis, as tenants in common; that the latter was devised to his son Thomas Lewis; that after the death of the testator, Thomas Lewis, being tenant in tail male of the former estate (the Buckingham farm), para-

mount to the will, as such elected to take the Buckingham farm, and is now in possession of the same; that before the institution of this suit, Thomas Lewis, under the statute, barred the estate tail in the Buckingham farm; that the Buckingham farm contains one hundred and six acres, worth sixty dollars per acre, and the Plumstead farm contains one hundred and four acres, worth thirty dollars per acre. This special verdict was set aside by the court, suggesting that plaintiffs might file a bill for compensation. Upon this decision error was assigned

Roberts and Dubois, for the plaintiffs in error.

Wright, for the defendants.

By Court, GIBSON, C. J. The doubt is not so much about the extent of the plaintiff's right, as about the means to enforce it. In England, the remedy is in equity; and the judge who ruled the cause was of opinion that the common pleas had equitable jurisdiction of the case by the thirteenth section of the act of the sixteenth of June, 1836, which gives that court, among other things, the powers of a court of equity, so far as relates to "the care of trust moneys and property, and other moneys and property;" and I will not say that this obscure clause might not be so construed, were it necessary to resort to it, as to shake off the imperfect remedy we were compelled to employ, as a substitute for a bill in equity. But jurisdiction is more explicitly given to the orphans' court, which, within the limits of its jurisdiction, is strictly a court of equity, proceeding by petition and answer, and enforcing its decrees by attachment, sequestration, or execution, as the case may require. By the fourth section of the act of the twenty-ninth of March, 1832, its jurisdiction is extended to all cases in which "executors, administrators, guardians, or trustees are possessed of, or undertake the care and management of, or are in any way accountable for, the real or personal estate of a decedent;" and the provision is repeated, word for word, in the nineteenth section of the act of 1836. Now, all the authorities show that equity relieves, in a case of the kind, on the ground of trust. The devise passes the legal title; but a chancellor holds the recusant devisee bound as a trustee, to compensate the devisee he has disappointed. Being seised of the legal estate, he is, in the words of the statute last quoted, a trustee possessed of, and accountable for, the real estate of a decedent; and were this purely a case for compensation, the remedy would undoubtedly be by sequestration. But the estate of the refractory devisee,

in this instance, is found in the special verdict to be worth twice as much as the estate he rejected; and it is impossible to conceive that the disappointed devisee could get more than compensation from it. As a general principle, the weight of authority decisively inclines to the side of compensation, and not forfeiture; and the writ of sequestration is used to prevent the disappointed devisee from being, in reality, a gainer by what was apparently his loss. After compensation is made, pursuant to it, the surplus remains to the devisee; but why employ it when there cannot, by any possibility, be a surplus? Where the disappointed devisee must be a loser, in any event, it would be useless to keep the property locked up in the hands of a sequestrator, who must be paid for his services. The profits from it would not be equal to the profits of the estate of which the complainant had been deprived; and the property would remain sequestered forever.

I confess that I have found no precedent for such a case; but it appears to me to be one, not of compensation, but of forfeiture. Even Lord Eldon, who maintained the principle of compensation as a general one, admitted in *Tibbitts v. Tibbitts*, 19 Ves. 656, and *Green v. Green*, Id. 665, that there are cases to which it is inapplicable. There would often be no other remedy than a decree to convey; and such a decree might, in this instance, have been obtained in the orphans' court. But was the plaintiff bound to obtain it, as the foundation of an action at law? As a consequence, if the legal title would have been decreed for his peculiar benefit, he might waive it, on the foot of a familiar maxim, and maintain his ejectment, according to the established practice, in Pennsylvania, on his equitable title. The court, therefore, had jurisdiction of the matter, in the form of the proceeding before it; and the plaintiff ought to have recovered.

Order of the common pleas reversed, and judgment for the plaintiff.

ELECTION BY ONE DEVISEE, EFFECT OF, UPON OTHERS.—Election by heir to take as heir, and consequent waiver of life estate given to him by the will, does not in any manner affect the estates of the remaindermen, and they will take in the same manner as if he had elected to take his life estate under the will: *Beall & McElfrest v. Schley*, 41 Am. Dec. 415. Devisee, whose land the testator has attempted to devise to another, cannot claim his own devise without surrendering the title to his land to such other devisee: *Gore v. Stephens*, 25 Id. 141.

JURISDICTION OF ORPHANS' COURT AND COURT OF COMMON PLEAS is concurrent where the other heirs seek a recovery in case of an election of one of their number. The principal case is cited as establishing this proposition in

Van Dyke's Appeal, 60 Pa. St. 488; *Leslie's Appeal*, 63 Id. 365; and upon the jurisdiction of the orphans' court in this respect, in *Dundas's Appeal*, 64 Id. 331. Upon the jurisdiction of the probate court in general, see note to *Fisher v. Bassett*, 33 Am. Dec. 239; *Wyman v. Campbell*, 31 Id. 677; *Bloom v. Burdick*, 37 Id. 299; *Gaines v. Smiley*, 45 Id. 295; *McDade v. Burch*, 50 Id. 407; *Lynch v. Baxter*, 51 Id. 735, and note.

MOORE v. SHULTZ.

[13 PENNSYLVANIA STATE, 98.]

USE IS EXECUTED WHERE THERE IS IN ESSE PERSON SEIZED to the use, a *cestui que use*, a well-defined use, and a seisin out of which it is to issue, and the property vests in the *cestui que use* from the date of the deed creating the use.

POWER TO DISPOSE OF ESTATE BY WILL GIVEN TO CESTUI QUE USE, in the deed creating the use, effects nothing, as the deed vests in him the fee.

MORTGAGE LIEN ON DECEDENT'S ESTATE IS DIVESTED by sale thereof for the payment of debts by order of the orphans' court.

SALE UNDER ORDER OF ORPHANS' COURT IS JUDICIAL SALE.

PURCHASER AT ORPHANS' COURT SALE TAKES ESTATE DISCHARGED from all debts due by decedent except liens, the amount of which cannot be rendered certain, and liens expressly created by act of assembly, which cannot, from their nature, be paid out of the purchase-money.

SCIRE FACIAS on a mortgage. Robert E. Shultz executed the mortgage to plaintiff, upon which this *scire facias* was issued, upon premises which he held in fee subject to a certain ground rental. Thereafter said Robert E. Shultz and wife conveyed these premises to Benjamin S. Shultz, "in trust for the use of Mrs. Susan S. Shultz and her heirs, with power to said Susan to dispose of the same, by an instrument in writing, duly executed, in the nature of a last will and testament." This Susan S. Shultz paid the interest on this mortgage during her lifetime. When she died, letters of administration were issued to William S. Shultz, the present defendant, who petitioned the orphans' court for the sale of said premises for the payment of decedent's debts, annexing to his petition a schedule of debts, among which this mortgage was included. The court ordered the sale, and the premises were sold. Out of the proceeds of this sale, after paying divers prior debts, including arrears on the ground rental before mentioned, there remained a sum insufficient to discharge the mortgage debt in full. Plaintiff received said residue under an agreement that it should be without prejudice, and brought this action. The district court held in favor of the defendant, deciding that the sale discharged the mortgage, whereupon the plaintiff brought error.

T. J. Wharton, for the plaintiff in error.

Barclay and Williams, contra.

By Court, COULTER, J. The use was executed by the statute. Benjamin S. Shultz, his heirs and assigns, were seised to the use of Mrs. Shultz, her heirs and assigns. There was *in esse* a person seised to the use, a *cestui que use*, a well-defined use, and a seisin out of which it was to issue. And where these exist, the statute executes the use, and the property in question must be considered as vested in Susan S. Shultz from the date of the deed in February, 1835, to Benjamin S. Shultz. It is a matter of no moment in this case that the deed contained a power to Susan to dispose of the estate, by an instrument of writing, in the nature of a will; because, as the deed divested the fee in her, the power could add nothing to it, and did not detract from a power to limit its extent; and was intended simply to authorize her to dispose of the estate if she died during coverture. As she became a widow, however, the power became merely useless or inoperative.

The remaining question to be decided is, whether a sale of the estate by order of the orphans' court, upon the petition of the administrator of Susan Shultz, for the payment of debts, divested the lien of a mortgage on the premises, executed by Robert E. Shultz before he conveyed to Benjamin for the use of Susan. I shall consider the question as if Susan had executed the mortgage herself, because after she became seised and possessed of the estate she paid the interest on the mortgage, and because, so far as this estate is concerned, it was as thoroughly her debt as if given by herself. She held subject to it, and it was a lien on the estate in her hands, and in point of fact, it was enumerated as her debt in the petition for sale of the premises. The *obiter dictum* of the court in the case of *Moliere v. Noe*, 4 Dall. 450, that mortgages were not discharged by an orphans' court sale, was doubtless recognized in several subsequent cases, and is the established rule on the subject. But the point was never expressly adjudicated in any case. I may observe that during that time the law was unsettled, except by mere *dicta*. The distinction taken by Chief Justice Tilghman, in *Moliere v. Noe*, between judgments and mortgages, to wit, that by the latter the fee was conveyed, never could have been entitled to much weight, in Pennsylvania; because here a mortgage has always been considered merely as a security for the payment of a debt: *Schuylkill Nav. Co. v. Thoburn*, 7 Serg. & R. 419; and as to third persons, the mortgagor has been

considered the real owner: *Simpson v. Ammons*, 1 Binn. 177 [2 Am. Dec. 425]. The interest of the mortgagee cannot be levied on and sold on a judgment against him. And yet in Pennsylvania, every interest of a debtor in real estate may be levied upon and sold. It is a lien on the estate of the mortgagor, and not a lien on any estate vested in the mortgagee.

In *Bowers v. Oyster*, 3 Penr. & W. 240, much discredit is thrown on *Moliere v. Noe*, and the above views corroborated. In *Hoover v. Shields*, 2 Id. 185; *McLanahan v. McLanahan*, Id. 279, and *Corporation v. Wallace*, 3 Rawle, 109, it was ruled that the lien of a mortgage was divested by a judicial sale on a junior judgment. These decisions produced the act of assembly which enacted that a sale made on a junior judgment should not, therefore, divest the lien of a prior mortgage. And it is by this act and its supplements that a mortgage enjoys any immunity beyond that of a judgment, as a lien. But the exempting statutes do not reach or apply to judicial sales made by order of the orphans' court. And this enforced the learned counsel for the plaintiff strenuously to contend that an orphans' court sale was not a judicial sale. But this notion cannot be entertained by the court. It is not a private sale. It is not a sale by the administrator, for he has no authority whatever to sell, *virtute officii*, real estate. It is a sale made by authority and direction of the orphans' court, which prescribes, or ought to prescribe, the time, manner, and conditions of the sale; and upon the report of the administrator, they determine whether their directions have been complied with, and whether or not the sale shall be confirmed. I am at a loss to imagine what can constitute a judicial sale if this does not, provided it be admitted that an orphans' court is a judicial tribunal; which, I presume, could not be denied. Sales of this kind have been denominated judicial sales in many of the decisions of this court; and substantially decided so to be in others, which it is not necessary to enumerate. And such I take the general understanding to be of the bench and the bar. If, then, it be a judicial sale, and a mortgage be the debt of the mortgagor, its lien is divested. The case of *Custer v. Deterer*, 3 Watts & S. 28, rules that the purchaser at an orphans' court sale takes the estate discharged from all debts due by the deceased. And the act of assembly is to the same effect. Purchasers at judicial sales hold the lands free from the debts of the person as whose estate it was sold, and from liens against a previous owner: *Luce v. Snively*, 4 Watts, 397. Liens, the extent or amount of which cannot be rendered certain, are not

divested, because they could not be paid out of the amount produced by the sale. And liens expressly created by act of assembly (such as the interest of the widow in one third of the valuation of land taken by an heir at the appraisement, and the lien or interest of the heirs for that third at the death of the widow) are not divested, because by the terms of the act the lien continues, into whose hands so ever the land may go, until it is paid; and as it cannot, from its very nature, be paid out of the purchase-money, the lien must remain. These are the only exceptions, and are so peculiar in their nature as plainly to point every purchaser to their continued existence.

It is, doubtless, the interest of the community (for all men must die), that the estates of decedents should be brought into compact administration, for the payment of all their debts. It is for the interest of their creditors and their heirs; and the orphans' court, from the nature of its duties, seems best adapted to supervise and control this administration. Hence, no doubt, were enacted the thirty-fifth and thirty-sixth sections of the act of the twenty-fourth of February, 1834, by which it is enacted that when it should appear, to the satisfaction of the court of common pleas, that the personal assets of the decedent are not sufficient to discharge an execution issued upon a judgment obtained against the decedent in his life-time, or against his executors or administrators after his death, the court shall stay all proceedings and direct and compel the executor or administrator to apply to the orphans' court for an order or decree to sell the real estate, and pay or apportion the assets of the real and personal estate to the discharge of all just demands upon the estate. And this proceeding would effectually disenfranchise the sale from any supposed continuing lien of a mortgage, and sufficiently evinces the spirit of our legislature with respect to orphans' court sales.

I lay no stress whatever on the argument that the orphans' court sale is of less publicity and solemnity than the sale by a sheriff. On the contrary, if the court does its duty, which is not to be doubted, the notice of sale is more full and ample in the orphans' court sale than that made by the sheriff; and the security to the creditor is as great, and the means of enforcement more prompt and efficacious, than in a sheriff's sale. That, however, lies within the province of the law-making power. By reversing the judgment below, instead of promoting equity and establishing justice, we would disturb many titles honestly acquired, and break up the settled practice

throughout the state. We are of opinion that a sale by virtue and authority of a decree of the orphans' court for the payment of debts of a deceased person, divests the lien of a mortgage as effectually as that of a judgment; and the other debts which are made a lien by act of assembly; and that the judgment of the court below, in favor of the defendant in the case stated, is right.

It is therefore affirmed.

USES, WHEN EXECUTED: See *Ramsay v. Marsh*, 13 Am. Dec. 717; *McCortee v. Orphan Asylum Soc.*, 18 Id. 516; *Chapman v. Glassell*, 48 Id. 41.

MORTGAGE EXTINGUISHED BY SALE OF LAND UNDER ORDER OF ORPHANS' COURT for payment of debts of decedent, although the mortgage was given by the former owner. The principal case is cited on this point in *Cadmus v. Jackson*, 52 Pa. St. 304; *Nice's Appeal*, 54 Id. 202; see also *Roberts v. Williams*, 34 Am. Dec. 549; *Bond v. Zeigler*, 44 Id. 656.

ORPHANS' COURT, NOT ADMINISTRATOR, prescribes terms of sale thereunder. The principal case is cited to this effect in *Baily's Appeal*, 32 Pa. St. 43; S. C., 2 Grant Cas. 228.

COMMONWEALTH EX REL. CLAGHORN v. CULLEN.

[13 PENNSYLVANIA STATE, 188.]

SUBSTANTIVE ALTERATIONS OF CHARTER WITHOUT CONCURRENCE OF CORPORATORS is an unauthorized interference with the contract existing between the public and the corporators.

ACT OR ASSENT OF CORPORATION MAY BE INFERRED from such circumstances of commission or omission as would raise a similar presumption in favor of or against a natural person.

BOARD OF OFFICERS VESTED WITH ALL POWERS OF CORPORATION, and upon whom the corporate existence is devolved, not only wield the whole corporate authority, but may apply for and agree to radical changes in the charter thereof.

RIGHT OF ASSENTING TO PROPOSED CHANGE IN CHARTER RESIDES in whole body of stockholders where they compose the corporation, though ordinarily represented by a board of directors charged with the exercise of corporate powers.

CORPORATION DOES NOT BECOME DEFUNCT FROM NEGLECT TO ELECT OFFICERS while the capacity to elect remains in the members.

RESPONSIVE ANSWER IN EQUITY IS EVIDENCE OF ALLEGED FACTS, requiring testimony to rebut it; but if not responsive, it is not evidence of facts alleged, and must be proved.

QUO WARRANTO IS COMMON-LAW PROCEEDING, under which a new defensive averment, answering plaintiff's case, is admissible.

VOTE OF ACCEPTANCE OF AMENDMENT TO CHARTER, to be valid as the act of the corporation, must be passed at a meeting duly convened, after notice to all the members.

WRITTEN ACCEPTANCE OF AMENDMENT TO CHARTER SIGNED BY MAJORITY of members of corporation is not sufficient.

WRITTEN ACCEPTANCE OF AMENDMENT TO CHARTER SIGNED BY ALL STOCKHOLDERS or parties in interest is sufficient.

PRESUMPTION OF ACCEPTANCE OF NEW OR AMENDED CHARTER, ARISING FROM ELECTION of corporate officers thereunder, is not conclusive in the face of an objecting minority at such election.

OPPORTUNITY TO DELIBERATE, AND IF POSSIBLE CONVINCE THEIR FELLOWS, is the right of the minority, of which they cannot be deprived by the arbitrary will of the majority.

PURVIEW OF TWELFTH SECTION OF ACT OF APRIL 13, 1840, covers all questions arising on writs of *quo warranto* between rival claimants of elective offices, and being highly remedial should be liberally construed.

THIS was a proceeding in the nature of a *quo warranto*, filed by John W. Claghorn and others, to show by what right Peter Cullen and others enjoyed the franchises, etc., of the Equitable Life Insurance Company of Philadelphia. The charter of the company provided that the corporate powers of the company should be administered by a board of six trustees and a secretary, to be elected at a time appointed; but until the first election the seventeen persons appointed to receive subscriptions should constitute the board of trustees. Under these circumstances, the company entered into business, Claghorn, the relator, being elected president. Before the time appointed for the first election of trustees, a supplement to the charter was passed, providing that the board of trustees should consist of seventeen members and a secretary, to be elected in the manner prescribed in the charter for the election of trustees, and that the present board of seventeen trustees should continue in office until the next annual election. Claghorn and the original board of trustees held over under this act, although no formal acceptance of said supplement was made. About three months after the passage of the first supplement a second supplement was passed, which provided that the board of trustees should consist of seventeen trustees, to be elected annually, but at a different time from that originally appointed, and repealed the former supplement. A majority of the stockholders signed an acceptance of this second amendment, and Cullen, one of the said defendants, the quondam vice-president of the corporation, called a general meeting of the stockholders to elect a board of trustees under the second amendment. The existing board of trustees protested against the call of the meeting, refused to accept the last amendment, and appointed a committee to attend the meeting and protest to the proceedings taken thereat. At the meeting, the defendants were elected trustees, and thereupon ejected the old board. The court below decided that neither supplement had been accepted,

and decreed that defendants be ousted from office; that an election for trustees of said company be held, appointing the time, and the manner of publishing notice thereof, and appointed trustees to take charge of the company until others should be elected, and to preside at and direct said election. Whereupon the relators took out a writ of error. The grounds relied upon in the writ and in the arguments of counsel appear in the opinion of the court.

Fallon and Haly, for the plaintiffs in error.

W. H. Rawle and G. W. Biddle, contra.

By Court, BELL, J. So far as we may judge from the pleadings and accompanying exhibits, under which the cause is brought before us, it presents the history of a struggle between rival parties, for the government of a private corporation, pending which, each has sought the aid of special legislation, apparently too hastily accorded to both. Such a course is usually detrimental to the best interests of companies intrusted with the management of capital; and it is to be feared the present instance cannot be esteemed an exception. Both the supplemental acts here in question propose to graft upon the original act of incorporation some very material alterations. Each provides for an increase in the number of trustees, and for changing the time of their election. The earlier of them continued in office, for an additional year, the first board of managers, and directs the election of a secretary by the whole body of corporators. If, under the facts developed, this is to be regarded as a valid amendment of the charter, the second supplement of April, 1849, becomes of decisive importance, not only because it fixes a new time for the annual election, and restores the appointment of secretary to the board of trustees, but by force also of its repealing clause is destructive of the first supplement. Should, however, this be decreed invalid, then the changes proposed by the younger enactment, in the organization of the board as originally designed, and the time of the election of its members, must be deemed radical in their character.

Of the numerous decisions that have been pronounced on this subject, it is unnecessary to bring to view other than the case of the *Dartmouth College v. Woodward*, 4 Wheat. 518, and our recent determination in *Brown v. Hummel*, 6 Pa. St. 86 [47 Am. Dec. 431], to prove that substantive alterations, such as those proposed by each of these supplementary acts, are not to be taken as parcel of a private character, without the previ-

ous concurrence of the corporators, manifested in some way recognized by the law. Unless so sanctioned they are esteemed as unauthorized interferences with a solemn compact between the public and the individuals composing the corporation; and therefore obnoxious to the constitutional prohibition touching the obligation of contracts. Whether this sanction has been extended to both or either of the supplements of January and April, are the leading questions presented for decision. Each of the contending parties claims this advantage for the enactment of his own procurement, and denies it to the antagonistic statute. Neither of them, however, pretends that there was any express, formal, and recorded act of acceptance, either by the corporators at large, or the board of trustees; nor, as will be presently seen, was this absolutely necessary. That the then board of trustees tacitly gave their assent to the older supplement, is not to be denied; for while the petition in effect asserts this, the answer admits it was produced as a recognized act, by the president of the board, at a meeting held on the twenty-fourth of January, 1849, and that the trustees, including several of the defendants, continued to hold their offices by virtue of the supplement, after the period for which they were first appointed.

Had these officers been clothed with power to accept or reject this statute, it is not to be doubted their silent acquiescence in its provisions, and continued exercise of authority by virtue of it, would have been sufficient to establish their assent. Anciently, indeed, it was supposed that, from the very nature of an artificial corporate body, it could legally manifest its acts and conclusions only by the use of its corporate seal, affixed to a deed in pursuance of authority previously given. But this idea has long since given way to the more reasonable doctrine that the act or assent of a corporation may be inferred from such circumstances of commission or omission as would raise a similar presumption in favor of or against a natural person. Corporations, it is now held, may be affected by implication, just as individuals are, and where its action or quiescence is the natural result or necessary accompaniment of some other supposed precedent fact, the existence of that fact will be assumed, both for purpose of charge and discharge. In the leading case of *Bank of United States v. Dandridge*, 12 Wheat. 70, Mr. Justice Story stated the principles thus: "Acts done by a corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proof of the latter;" and this is true, though no minute of them can be found

among the records of the corporation. By way of illustration, he instanced the case of one notoriously acting as cashier of a bank, and so recognized by the directors, which is sufficient of itself to raise a presumption of his due appointment, and his acts as cashier will bind the institution, though no written proof of the appointment can be produced. Both in England and with us, this principle has been liberally extended and applied, where the questions were of the acceptance of a charter. In this country, where private corporations are very numerous, and constant use of their privileges naturally engenders indolence in the creation of regular evidence of corporate acts, and negligence in its preservation, the recognition of presumptions, as legitimate sources of proof, was a legal necessity. While, therefore, a charter granted to persons who have not solicited it, is said to be *in fieri* until after acceptance, yet it is not indispensable to show a written instrument, or even a vote acceding to the grant, for unless the charter expressly prohibited, every formality may be presumed from a continual exercise of the corporate powers.

This is also true of assent to a new or additional charter by an existing corporation, which may, in like manner, be inferred from acts or omissions inconsistent with any other hypothesis; and where the new grant is beneficial in its aspect, it is thought very little is required to found a presumption of acceptance: *Bank of United States v. Dandridge*, 12 Wheat. 71; *Charles River Bridge v. Warren Bridge*, 7 Pick. 344; *Trott v. Warren*, 11 Me. 227; *Ameriscoggin Bridge v. Bragg*, 11 N. H. 102; *Riddle v. Proprietors of Canals*, 7 Mass. 184 [5 Am. Dec. 35]; *Penobscot Co. v. Lamson*, 16 Me. 224 [33 Am. Dec. 656]; *King v. Amery*, 1 T. R. 575; S. C., 2 Id. 515; *Newling v. Francis*, 3 Id. 189.

Nay, a single unequivocal act may be potent enough conclusively to establish assent; as, for instance, if a suit be brought and persisted in, where it could be sustained only under the provisions of the amended charter. A similar observation was made in deciding *Lincoln and Kentucky Bank v. Richardson*, 1 Greenl. 460 [10 Am. Dec. 34], and the court added that the stockholders of the bank are bound by every act which amounts to an acceptance on the part of the directors. But if by this was meant that the whole body of the corporation may generally be so bound by the acts of their agents, selected to administer the affairs of the corporation, the proposition cannot be acceded to. As is well remarked of this proposition in another place, it is founded upon the consideration that certain

persons have been invested with sufficient power to bind the whole body by their acceptance, for where it is otherwise, the charter must be accepted by a majority of the whole number of the company: *Angell & Ames on Corp.* 53. Corporate powers are usually distinguished into legislative, electoral, and administrative—in private corporations aggregate, though sometimes all the members act immediately in the administration of its affairs, usually, for the sake of convenience, the direct management is intrusted by the charter to certain officers, or board of managers, elected by the members at large, though deriving their ordinary powers from the act of incorporation. These officers exercise the legislative and administrative functions; the former in the institution of by-laws for the general government of the company, the latter in the superintendence and execution of its general business: *Union Turnpike Company v. Jenkins*, 1 Cai. 381.

In other instances, a select few, representing all those interested in the object of the association, are erected into and vested with all the powers of a corporation, and sometimes the selected branches are divided into distinct classes, as is the case in the corporation of St. Mary's church, in this city. When the corporate existence is devolved on a board of officers, they not only wield the whole corporate authority, but may apply for and agree to radical changes in the instrument to which they owe their corporate being. When such a board is separated into integral parts, occupying distinct positions, both must concur in any act having for its object an alteration of the fundamental law, though in the exercise of the ordinary powers of a corporation, they act jointly, and are governed by a majority of the united bodies: *Case of St. Mary's Church*, 6 Serg. & R. 498. But these and other authorities evidence that where the whole body of stockholders, or other persons in interest, compose the corporation, the right of assenting to any proposed change in the charter resides in them, though ordinarily represented by a board of directors charged with the exercise of the corporate powers. These in their capacity of managers have no authority, either to call for or assent to a change of the corporate constitution, but by the agreement of a majority of the corporators. Being neither legislative nor administrative, the express assumption of such authority by the servants of the corporation would be a usurpation, for it is paramount, not only to every corporate function, but the constitution itself, and as it may touch the very existence of the body, it can only be exerted by that body. It cannot then be

said that the assent of the original trustees to the January supplement is such an act of acceptance as will bind the corporation. Yet, as we have seen, a long acquiescence by the members of the company, in acts and declarations of the trustees recognizing the supplement as part of the charter, might constitute conclusive evidence of assent to it. Was there here any such acquiescence? Is there anything shown from which we can safely draw the inference that the company, knowing of the supplement, agreed to it as a portion of their constitution?

Perhaps it may be said that as the terms of the additional grant were favorable to the company, slight circumstances would justify a presumption of acceptance. But is there any ground, however narrow, upon which we can safely erect such an hypothesis? I have looked with some solicitude, but in vain, for a precedent that might justify an affirmative answer to this proposition, to which my judgment refuses its assent.

It does not appear that the company was ever officially notified of the enactment. The defendants swear it was first produced at a meeting of the board by Mr. Claghorn, then president, on the twenty-fourth of January. By the provisions of the original charter, the trustees then in office might legally continue until about that time. From thence until the enactment of the second supplement was a little over two months. During this interval we are not informed that the trustees or their agents performed any official act, or distinctly exerted the corporate power with the knowledge of their constituents. For aught the pleadings show, they sat still with folded arms doing nothing and requiring nothing. Now, it seems to me that the mere omission of the stockholders to assemble in formal meeting within that period, for the purpose of electing other trustees, affords no presumption of assent sufficient to fasten upon them radical changes of their charter. Mere non-action for so brief a time ought not to draw after it a consequence so serious, particularly when it is recollected that the call of such a meeting would come most appropriately from the board itself. In answer to this, it is not sufficient to suggest that a failure to elect trustees ought to be received as strong proof of acceptance; since, without this, a dissolution of the corporation must ensue. Perhaps, anciently, such would have been the result; but the present doctrine is, that a corporation does not become defunct from a simple neglect to elect officers, while the capacity to elect remains in the members: *Lehigh Bridge Co. v. Lehigh C. & N. Co.*, 4 Rawle, 24 [26 Am. Dec. 111]; *Slee v. Bloom*, 5 Johns. Ch. 366. It is said

a corporation possesses a strong and tenacious principle of vitality: *Colchester Corporation v. Seaber*, 3 Burr. 1866; and it therefore requires a long non-user of franchises to induce the courts to presume a surrender of corporate rights: *Penniman v. Briggs*, Hopk. 343. It follows, the argument derives no aid from this source to establish a presumption of assent. But is there not evidence of positive dissent? We find that very shortly after its passage a sentiment of active hostility to the first supplement is manifested by a majority in number and value of the stockholders. When this began, we are not precisely informed, but we know that in less than three months after the date of the objectionable enactment, the feeling of opposition led to its repeal. It is fair, therefore, to infer it commenced at the moment the law was communicated to the board of trustees. How, then, with a knowledge of this important fact, can we regard the assertion that a majority of the company had agreed to accept it as an approved amendment of the first act of incorporation?

It is, however, claimed that the supplement of April recognizes that of January to be in full force, because the latter repeals the former. The position is, that if invalid, a formal repeal of the unaccepted act was unnecessary. Admitting this, I am at a loss to perceive how mere supererogation can derive an unintended positive effect from its non-usefulness. Besides, the repealing clause is not the work of the dissenting members of this corporation. Their rights are consequently unaffected by it. But the argument in favor of the first supplement is chiefly founded upon certain passages in the answer of the defendants, by which it is said they concede the first board of trustees were continued rightfully in office by virtue of this supplement. It is obvious, however, these passages are but echoes of the relator's petition, introduced, not in confirmation of it, but with reference to the immediately preceding denial of acceptance formerly averred, and thus putting in issue the title of the relators. It is replied, this denial is not responsive to the bill, which does not distinctly aver acceptance. I think this is a mistake. Although in this part of the complaint there is no direct assertion of the assent of the company to the January supplement, that act is distinctly referred to as an operative portion of the charter, which it could not be without acceptance. But were this not so, the counter allegation would be by no means valueless. In equity proceedings, the distinction seems to be that an answer, if responsive, is evidence of the fact it alleges requiring testimony to rebut it; but if the

matter set forth be not responsive, it is not evidence of that matter at all, but must be proved: 1 Smith's Ch. Pr. 272, note; *Clark's Ex'rs v. Van Riemsdyk*, 9 Cranch, 160; *Hart v. Ten Eyck*, 2 Johns. Ch. 90. But this is in fact a proceeding at common law. Under its system a new defensive averment, if it answers the plaintiff's case, is inadmissible. As under our act of 1840, to be presently more particularly noticed, the relator's title may be put in issue, under the *quo warranto*, any allegation affecting it may be material, and its truth will be conceded by a demurrer. If, therefore, in this instance, we adhered strictly to technical rule, we might perhaps be compelled to say that the plaintiffs, by their demurrer, admitted the non-acceptance of the first settlement, and are thus concluded now to deny it. But as we think neither party contemplated this, when framing their pleadings, we prefer to rest our conclusions, as to this part of the case, on the absence of reliable proof of assent, either direct or inferential.

This brings us to the second question, whether there is any evidence of the acceptance of the April supplement. Our own determination in *Shortz v. Unangst*, 3 Watts & S. 45, following earlier decisions, settles that to make a vote of acceptance valid, as the act of a corporation, it should be passed at a meeting duly convened, after notice to all the members. In such cases, congregated deliberation is deemed essential, and where an opportunity for this is afforded, the decision of a majority is binding, if no other mode be prescribed by the charter. The private procurement of a written assent, signed by a majority of the members, will not supply the want of a meeting. Such an expedient deprives those interested of the benefit of mutual discussion, and subjects them to the hazard of fraudulent misrepresentation and undue influence. Notwithstanding the objection, however, it seems to be agreed that a written acceptance, though not executed at a meeting, may be sufficient, if signed by all the stockholders or parties in interest: *Davies v. Hawkins*, 3 Mau. & Sel. 488; *Stow v. Wyse*, 7 Conn. 214 [18 Am. Dec. 99]; *Livingston v. Lynch*, 4 Johns. Ch. 573; *St. Mary's Church*, 6 Serg. & R. 498. As this is not true of the paper of the ninth of April, 1849, the defendants very properly disclaim it, as furnishing evidence of acceptance. But they rely on the unanimous act of the majority of stockholders at a meeting convened by public advertisement, for the purpose of electing trustees, at which those now exercising that office received the whole number of votes of those in attendance. I concede there can scarcely be stronger evidence of acceptance

than that furnished by an election of corporate officers in pursuance of a new or the alteration of an old charter: *Rex & Regina v. Larwood*, 1 Ld. Raym. 29; *Newling v. Francis*, 3 T. R. 189. Yet, like other corporate acts, it is but presumptive evidence of the prior assent of the company, by a vote of its members, at some supposed meeting, or at least of a deliberate waiver of a vote by all in the corporation having that right. But how can such a presumption be entertained, in the face of a remonstrance against the proposed election, made by some of the members on the ground of non-acceptance of the younger supplement? This is obviously out of the question. The record shows that the same persons who signed the written acceptance also signed the requisition for a new election of trustees, claiming to be a majority of the stockholders; and that the votes subsequently cast were by the same individuals.

All this was done in disregard of a formal resolution, adopted by those then claiming to be trustees, repudiating the last supplement, and denouncing as illegal the election proposed to be held under it. This resolution was communicated by a committee appointed for that purpose to the subsequent electoral meeting, but without effect. It will not do to say the resolution, as the act of a defunct body, was naught. It at least served to express dissent, entertained and expressed by a portion of the members—a dissent that could only be legally overcome at a meeting regularly convened to consider the proposed amendment. The opportunity to deliberate, and if possible, to convince their fellows, is the right of the minority, of which they cannot be deprived by the arbitrary will of the majority. That the call for an election, and the subsequent steps, were in contempt of this right, is manifest. The attempt consequently defeats itself. We have, therefore, no hesitancy in holding there is an entire want of proof of the acceptance of either supplement.

Was the court of common pleas authorized so to declare in this proceeding, and so decree a new election? The relators insist the only question before that court was as to the binding efficacy of the April supplement; and that their title as trustees under the act of January was not in issue. But this objection proceeds from too narrow an estimate of the act of the thirteenth of April, 1840; though the twelfth section of that statute speaks only of disputes between persons claiming to be duly elected to fill any office, its purview is broad enough to cover all questions arising on writs of *quo warranto*, between rival claimants of elective offices, though some of them may,

as here, claim to hold by temporary legislative appointment. The object of the statute is to invest the court with power to settle the pretensions of all the claimants, in the same proceeding, whether they be complainants or defendants, and whether in or out of possession. To exclude from its operation corporate officers, who, like these plaintiffs, derived their first appointment from the act of incorporation, in anticipation of a regular election, would be to sacrifice to literal interpretation the plain intent of the law-givers. The act speaks of disputed elections between persons claiming to be duly elected, and these, doubtless, were principally regarded in passing its provisions.

But cases like ours are within the mischief intended to be remedied, and so, questionless, within the equity of the statute, which, being highly remedial, ought to be so literally construed as to secure the attainment of substantial justice. Here, then, is a case of contested election, intimately connected with the title set up by the plaintiff, and almost necessarily involving an investigation of it. Being within the object of the act, which was to end disputes at a blow, that title was as open to inquiry as the defendant's. The result shows that neither party was entitled to enjoy; and this put it within the authority of the court to order a new election. This conclusion leaves to the company the right of determining, in an orderly way, whether it will accept of either supplement, as an amendment of its charter, and if so, which of them? The dispute now existing may be so settled as to leave no room for future contest—a consummation much to be desired by a business corporation situate as this is. It is gratifying to find the conclusions of the law are thus in harmony with the best interests of the corporators, and we accordingly recommend that steps be taken as soon as practicable to terminate this unhappy disagreement.

Proceedings affirmed.

WHAT CONSTITUTES ACCEPTANCE BY CORPORATION OF LEGISLATIVE AMENDMENT TO ITS CHARTER.—The celebrated *Dartmouth College Case*, 4 Wheat. 518, which, whether for good or ill, has withstood all attempts to overthrow it, has ingrafted into American jurisprudence the principle that when the legislature grants certain franchises and privileges of a private nature to a body of individuals, who in their turn accept these franchises with their attendant obligations, there is formed and exists a contract between the body of individuals, or private corporation and the state, which falls within the constitutional restriction of legislative interference with the obligation of contracts. The fundamental principle of right and justice which should restrain legislative interference with private vested rights would undoubtedly

have a strong if not conclusive influence in restraining the all-powerful parliament of England from changing or repealing a charter without the consent of the corporation. But although the king cannot destroy a corporation, *King v. Amery*, 2 T. R. 532, "a corporation may be dissolved by act of parliament, which is boundless in its operations:" 1 Bla. Com. 485; 2 Kyd on Corp. 447. And it is a conclusion from the omnipotence of parliament that it may change the charter against the will of the corporators, though such a violation of vested rights would undoubtedly be restrained by public opinion, as being subversive of the law and constitution of the country. In fact, this was done in one case where such action was attempted: See *Regents etc. v. Williams*, 9 Gill & J. 408, 409; S. C., 31 Am. Dec. 72, 96. But where a contract is conceded to exist, that contract cannot be rescinded or modified except upon the consent, express or implied, of both parties. The consent of the legislature is manifested by its passage of the amendatory act. What, under the varying circumstances which may arise, will constitute a consent on the part of the corporation, it is the purpose of this note to discuss. The general statement that the legislature cannot compulsorily alter the contract relations existing between the state and the corporation, and between the corporators among themselves, is wholly true. But the corporation, like a natural person, is subject to the general legislative power of the state. The power of the legislature to pass laws for the government and general welfare of the community is not restricted by charters granted to corporations: See Morawetz on Corp., secs. 438 et seq.; Field on Corp., secs. 33 et seq. The inviolability of the contract relation however has caused the very common practice on the part of the state of introducing into the terms of the contract or charter a reservation of power to amend, alter, or repeal the same; or of effecting the same object by passing a general law to the same purport in respect to all corporations formed after the passage or taking effect thereof. The effect of such reservations upon the acceptance necessary by the corporation is considered below. In reaching conclusions as to what constitutes a valid and binding acceptance of a legislative amendment, it is to be continually kept in mind that besides the contract existing between the state and the corporation there are two other contracts which grow out of the corporate relation; namely, the contract existing between the corporation as such and the individual corporators, or, stating it in the other way, the compact existing between the stockholders among themselves, and which is evidenced by the charter and the stock subscriptions; and secondly, the contracts which may arise by means of corporate acts between the corporation as such and third persons. Out of these two contract relations the cases which contain the law upon corporate acceptance of legislative amendments have arisen. Thus under the first contract, the corporation seeks to enforce and collect the stock subscription of a stockholder, and he defends, that an amendment has been accepted by a portion of the stockholders without his consent, and therefore his contract, that is, the charter of the corporation, has been changed without his consent, and he is no longer bound thereby. Under the second class of contracts, a corporation sues or is sued by a third person upon a contract entered into under the provisions of an amendment, and it is defended, that the amendment never having become a part of the charter by being properly accepted, the acts of the corporation thereunder are not binding upon the corporation or third persons, and therefore that the contract sued upon is void. Under each aspect of the case different principles have been established. And it is believed that if these distinctions are duly adhered to, much, if not all, of the loose *dicta* and too general statements of rules found in the books will become intelligible and consistent.

ACCEPTANCE MUST BE UNANIMOUS IN ORDER TO BIND STOCKHOLDER, WHEN. Upon the well-recognized principles of contract, it might be at once affirmed that any alteration in the charter which affects in any way the compact existing between the members of the corporation cannot take effect until accepted by the unanimous voice of all. A change in the terms of a contract between two or more persons cannot be made except under and by means of the consent of each and all of the contractors. This is urged as the only true and safe rule by Mr. Morawetz in his treatise on the law of private corporations, sections 53, 196, 201. And there are cases which hold and enforce this rule to its consistent and legitimate end, declaring that an inquiry into the advantage or disadvantage which follows to a dissenting stockholder from the adoption of an amendment by a majority of his fellows, or the materiality or immateriality of its effect upon his contract, is not justifiable; and that the private reasons which a stockholder may have had for entering into the corporation are, in the absence of fraud, effectually withdrawn from the observation of the court, and therefore that no change whatever in the charter made without his sanction is binding upon him: *Cent. R. Co. v. Collins*, 40 Ga. 617; *Zabriskie v. Hackensack R. Co.*, 18 N. J. Eq. 178. But such a rule has been found too stringent for the practical administration of justice. Too much power would thus be placed in a small minority to clog the wheels of a large corporation by interposing an injunction to its further progress under an amendment which, though making no material change in the charter, might yet contain such further privileges or indemnities as would be not only highly beneficial to the corporation, but also, perhaps, absolutely necessary to the profitable prosecution of its business. Or, again, a corporator might, under this rule, when his subscription to the capital stock was sought to be collected, avoid it upon the ground that the charter had been changed in some immaterial way, though the alteration had never affected his interests. The courts have, therefore, almost unanimously agreed in restricting their protection over the minority to those changes in the charter which are radical. The rule may be stated as follows: In the absence of power reserved in the legislature to amend the charter, or of a provision in the charter that the majority may accept an amendment thereto, the majority by an acceptance of a material, radical, and fundamental change in the charter can bind only themselves, and a dissenting subscriber will be discharged from his contract of subscription: *Mowrey v. Ind. & Cin. R. Co.*, 4 Biss. 86; *Clearwater v. Meredith*, 1 Wall. 25, 40; *Railway Co. v. Allerton*, 18 Id. 233, 235; *Ashton v. Burbank*, 2 Dill. 435; *Printing House v. Trustees*, 104 U. S. 711; *Kenosha etc. R. Co. v. Marsh*, 17 Wis. 13; *Indiana etc. Turn. Co. v. Phillips*, 2 Penr. & W. 184; *Brown v. Fairmount Min. Co.*, 10 Phila. 32; *Turnp. Co. v. Arndt*, 31 Pa. St. 317; *Lawman v. Lebanon Valley etc. R. Co.*, 30 Id. 42; *McCray v. Junction R. Co.*, 9 Ind. 358; *Booe v. Junction R. Co.*, 10 Id. 93; *Shelbyville Turnp. Co. v. Barnes*, 42 Id. 498; *Supervisors of Fulton Co. v. Miss. etc. R. Co.*, 21 Ill. 338; *Troy etc. R. Co. v. Kerr*, 17 Barb. 581, 607; *Buffalo etc. R. Co. v. Potter*, 18 Id. 21; *Hartford etc. R. Co. v. Cronwell*, 5 Hill, 383, 386; *New Orleans etc. R. Co. v. Harris*, 27 Miss. 517, 537, 539; *Hester v. Memphis etc. R. Co.*, 32 Id. 380; *Champion v. Memphis etc. R. Co.*, 35 Id. 692; *State v. Accommodation Bank of La.*, 26 La. Ann. 288; *Hoey v. Henderson*, 32 Id. 1069; *Stevens v. Rutland etc. R. Co.*, 29 Vt. 546; *Waring v. Mayor etc. of Mobile*, 24 Ala. 701; *Winter v. Muscogee R. Co.*, 11 Ga. 438; *Fry v. Lexington R. Co.*, 2 Metc. (Ky.) 314; *Thompson v. Guion*, 5 Jones Eq. 113; *Charlotte Bank v. Charlotte*, 85 N. C. 433; *Middlesex Turnp. Corp. v. Locke*, 8 Mass. 267; *Middlesex Turnp. Corp. v. Swan*, 10 Id. 385; *Old Town etc. R. Co. v. Veazie*, 39 Me. 571; *Kean v. Johnson*, 9 N. J. Eq. 407; *Black v. Delaware*

etc. Canal Co., 24 Id. 455, 466; *Tuttle v. Mich. Air Line*, 35 Mich. 247; *Marrietta etc. R. Co. v. Elliott*, 10 Ohio St. 57; *Union Locks etc. v. Towne*, 1 N. H. 44; *Witter v. Miss. R. Co.*, 20 Ark. 488; *Miss. etc. R. Co. v. Cross*, Id. 443; see *Clinch v. Financial Co.*, L. R. 4 Ch. Ap. 117; *Dougan's Case*, L. R. 8 Ch. Ap. 540; *Simpson v. Denison*, 10 Hare, 54, 56.

But here the unanimity of the cases ceases, and we find them varying as to what constitutes a fundamental change in a charter. The legislature cannot in its amendatory act authorize the majority to accept the amendment, and thereby bind the minority: *New Orleans etc. R. Co. v. Harris*, 27 Miss. 517. One subscribing for shares in a corporation after it has accepted an amendment cannot refuse to be bound by his subscription, because he was ignorant of such change in the charter: *Sparrow v. Evansville etc. R. Co.*, 7 Ind. 369; *Eppes v. Miss. etc. R. Co.*, 35 Ala. 54. A charter accepted after alterations have been made therein is taken subject thereto: *Canal Co. v. Railroad Co.*, 4 Gill & J. 1.

MAJORITY MAY BIND MINORITY BY ACCEPTANCE, WHEN.—Those changes in the charter which in no way materially affect the compact subsisting between the associate stockholders, but which clothe the corporation merely with such additional immunities and privileges as are in furtherance of the main design, and yet neither restrictive nor extensive thereof, will be, when accepted by the majority, binding upon the whole corporation, and a dissenting subscriber will remain liable upon his stock: *Fry's Ex'rs v. Lexington etc. R. Co.*, 2 Metc. (Ky.) 322; *Waring v. Mayor etc. of Mobile*, 24 Ala. 201; *Everhart v. Westchester etc. R. Co.*, 28 Pa. St. 339; *Irvine v. Turnp. Co.*, 2 Penr. & W. 474; *Clark v. Monongahela Nav. Co.*, 10 Watts, 364; *Poughkeepsie etc. Plank R. Co. v. Griffin*, 24 N. Y. 150; *Taggart v. Western Md. R. Co.*, 24 Md. 564; *Bank v. Richardson*, 1 Me. 79; *Bucksport R. Co. v. Buck*, 68 Id. 81; *Woodfork v. Union Bank*, 3 Coldw. 488; *Greeneville etc. R. Co. v. Johnson*, 8 Baxt. 332; *State v. Accommodation Bank of La.*, 26 La. Ann. 288; *Joy v. Jackson etc. R. Co.*, 11 Mich. 155; *Wilson v. Wills Valley R. Co.*, 33 Ga. 470; *Fall River Iron Works v. Old Colony R. Co.*, 5 Allen, 221; *Agricultural R. Co. v. Winchester*, 13 Id. 29; *Peoria v. Preston*, 35 Iowa, 115; see *Pacific R. Co. v. Hughes*, 22 Mo. 297, and the principal case. Dissenting stockholders will be bound by the accepting vote of the majority, even in case of fundamental alterations, when by their charter they have agreed to allow the majority to bind all in accepting amendments. But a vote of the majority of the stockholders is not equivalent to a vote of the majority of all the stock: *Witter v. Miss. etc. R. Co.*, 20 Ark. 463. There is, however, a minority of authorities, especially in the states of Illinois and Missouri, which, while recognizing that the majority, by its vote, cannot bind the corporation to fundamental changes, nevertheless hold the minority to be bound in those cases where, although the general character and scope of the corporation remains the same under the amendment, yet grave alterations are worked in the organization of the company, and serious changes are made in the extent of the undertaking which the corporation was organized to perform: *Barret v. Alton etc. R. Co.*, 13 Ill. 504; *Peoria etc. R. Co. v. Elting*, 17 Id. 429; *Sprague v. Illinois Riv. R. Co.*, 19 Id. 174; *Illinois Riv. R. Co. v. Zimmer*, 20 Id. 654; *Rice v. Rock Island R. Co.*, 21 Id. 93; *Illinois Grand Trunk R. Co. v. Cook*, 29 Id. 243; *Ross v. C. B. & Q. R. Co.*, 77 Id. 134; *Pacific R. Co. v. Renshaw*, 18 Mo. 210; *Pacific R. Co. v. Hughes*, 22 Id. 297; see also *Gray v. Monongahela Nav. Co.*, 2 Watts & S. 156; *Cross v. Peach Bottom R. Co.*, 90 Pa. St. 392; *Delaware R. Co. v. Tharp*, 1 Houst. 174; *Martin v. Pensacola R. Co.*, 8 Fla. 381; *Dayton etc. R. Co. v. Hatch*, 1 Disney, 84; *Currie v. Mut. Ass. Soc.*, 4 Hen. & M. 315.

These cases generally maintain that the majority may accept an amend-

ment which extends the powers of the corporation to any degree, provided that the distinguishing features of the corporation remain. That is, that so long as a railroad corporation still remains a railroad corporation, and does not, for example, become an insurance corporation, the limits and characteristics of the work which it was authorized to perform, as defined in the charter, may be extended and changed to any extent. The will of the majority should govern unless there is fraud or an entire change of the original purpose: *Sprague v. Illinois etc. R. Co.*, 19 Ill. 174; *Illinois etc. R. Co. v. Zimmer*, 20 Id. 654. In *Pacific R. Co. v. Hughes*, 22 Mo. 297, it is argued, on the ground of an implied agreement in the formation of the contract, that it is lawful, as well as highly expedient, to give the majority full power to bind the minority, even in case of fundamental and radical alterations, as they may in the prosecution of the ordinary business of the corporation under the charter; and, at least, that any changes in the charter which increase the powers of the corporation, or organize it in a different way but still leave it with full power to carry out its original object, may be accepted by the majority, and such acceptance furnishes no defense at law to a dissenting subscriber, although it is intimated that if the changes were radical in their nature he might have a remedy in equity, such as by enjoining the action of the corporation under the amendment. See also, as favoring this extreme right in the majority, *Martin v. Pensacola R. Co.*, 8 Fla. 389, and *Ware v. Grand Junction Water Co.*, 2 Russ. & M. 470. But even where this extreme doctrine of the power of the majority prevails, it is held that if a subscriber expressly stipulate in his contract of subscription that certain changes shall not be made without his consent, such stipulation will be upheld: *Martin v. Pensacola R. Co.*, 8 Fla. 370. And any fundamental change in the charter will release the dissenting stockholder. Thus in *Supervisors of Fulton Co. v. Miss. etc. R. Co.*, 21 Ill. 338, 371, it is said: "In the cases referred to [*Barret v. Alton etc. R. Co.*, *Sprague v. Ill. Riv. R. Co.*, and *Ill. Riv. R. Co. v. Zimmer*, *supra*], it is nowhere intimated that fundamental changes by the legislature shall not release subscribers to stock, though those changes in the charter be accepted by the directors. It is only such alterations as may be fairly regarded as auxiliary to the original design." In corporations where there are different classes, the majority of each class must consent, before the charter can be altered in any way: *St. Mary's Church*, 7 Serg. & R. 516. The grant of an amendment at the instance of the managers of the corporation, or of the majority of the stockholders, which has never been acted upon or formally accepted, will not discharge a dissenting subscriber: *Fry's Ex'rs v. Lexington etc. R. Co.*, 2 Metc. (Ky.) 322; *Clark v. Monongahela Nav. Co.*, 10 Watts, 367; see *Matter of Merc. Lib. Co.*, 2 Brewst. 447. Although, as will be seen further on, the directors of a corporation, by acting under an amendment, may bind the corporation when the rights of third persons are involved, still there is no power in the directors, in the first instance, to apply for or accept an amendment: *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579; *Brown v. Fairmount Min. Co.*, 10 Phila. 32; see *Blatchford v. Ross*, 5 Abb. Pr., N. S., 434; S. C., 37 How. Pr. 110, and the principal case in the instance of the first supplement.

WHAT ARE FUNDAMENTAL ALTERATIONS REQUIRING CONSENT OF ALL STOCKHOLDERS.—As has been seen, it is well settled that a fundamental change in the charter will discharge a stockholder from liability if made without his consent. The expression "material, fundamental, and radical change," like that of "reasonable time," as used in the law of negotiable instruments, is not sufficiently restricted in its meaning to prevent a conflict

of authority. The materiality of an amendment is a question of law: *Memphis Branch R. Co. v. Sullivan*, 57 Ga. 240; *Witter v. Miss. etc. R. Co.*, 20 Ark. 463. But it is not error to submit to the jury the question as to whether a change in the charter is radical, with a direction to find that the subscriber could not be held to his subscription if such was the case: *Southern Penn. Co. v. Stephen's Ex'rs*, 88 Pa. St. 190. The great majority of the cases which have required the determination of the materiality of an amendment have arisen in the case of railroad and turnpike corporations, where the majority have sought to change the roadway as described in the charter, under a legislative amendment thereto granting the privilege. The number of decided cases does not warrant the statement that is sometimes made, that the determination of the materiality of the departure from the charter roadway must rest purely upon the circumstances of each case: See *Witter v. Miss. etc. R. R. Co.*, 20 Ark. 463. The majority cannot bind a dissenting stockholder by accepting any change in the general course or direction of the charter roadway which would cause it to run through a different section of country, or otherwise essentially alter the original plan of the road: *Hester v. Memphis etc. R. Co.*, 82 Miss. 380; *Champion v. Memphis etc. R. Co.*, 35 Id. 692; *Winter v. Muscogee R. Co.*, 11 Ga. 45; *Buffalo etc. R. Co. v. Pottle*, 23 Barb. 21; see *Simpson v. Denison*, 10 Hare, 54, 56. Thus, if the terminus of the road, as defined and fixed by the charter, is changed, a dissenting subscriber will be discharged: *Marietta etc. R. Co. v. Elliott*, 10 Ohio St. 57; *Middlesex Turnp. Corp. v. Locke*, 8 Mass. 287; *Middlesex Turnp. Corp. v. Swan*, Id. 385; *Plank Road etc. Co. v. Arndt*, 31 Pa. St. 317; *Thompson v. Guion*, 5 Jones Eq. 112. In the last case, the change was a good defense at law, because the subscriber could not enforce the original charter in equity against the authority of the legislature. So a privilege of extending the road beyond its charter limits is fundamental; *Stephens v. Rutland etc. R. Co.*, 29 Vt. 545, holding that the dissenting stockholder might enjoin the accepting majority from acting under the amendment. But where the termini remain the same, a change in the intermediate course of the road is not fundamental, provided the general course of the road is still retained. The purely personal benefits which a subscriber would have obtained had the road passed through a certain town, or crossed a river at the place named in the charter, and near which town or crossing he owned certain property which he expected to be benefited by the construction of the road, instead of passing through a neighboring town or crossing the river a little further up or down, as it was authorized to do by the amendment, is not to be considered in determining whether his contract with the corporation has been impaired. The true criterion is, whether the general interests of the corporation have been sacrificed thereby, and whether the profits derived from his stock have been lessened. Under such circumstances, a change in the intermediate course of the roadway, the direction in general remaining the same, would be fundamental; otherwise, not: *Fry's Ex'rs v. Lexington etc. R. Co.*, 2 Meta. (Ky.) 322, 323; *Wilson v. Wills Valley R. Co.*, 83 Ga. 466; *Irvine v. Turnpike Co.*, 2 Penr. & W. 474; *Fall River Iron Works v. Old Colony R. Co.*, 5 Allen, 221; *Barret v. Alton & S. R. Co.*, 13 Ill. 504; *contra: Witter v. Miss. R. Co.*, 20 Ark. 463. So, in case of power to construct a branch road, the termini remaining the same: *Peoria etc. R. Co. v. Preston*, 35 Iowa, 115. See this further discussed by W. H. Whittaker in an article in 16 Am. Law Rev. 101, where the writer reaches much the same conclusions as above.

In the Illinois courts, the same principle that the stockholder's interest, as far as it concerns the materiality of an amendment, is merged in his interest

as a corporator is maintained: *Sprague v. Ill. Riv. R. Co.*, 19 Ill. 174; *Ill. Riv. R. Co. v. Zimmer*, 20 Id. 654. See, also, recognizing the same principle, *Irvine v. Turnpike Co.*, 2 Penr. & W. 466. But they go further than other authorities in holding that a subscriber's contract is not materially infringed, when the majority, contrary to his wishes, are allowed to accept an amendment extending the road beyond the charter terminus: *Peoria etc. R. Co. v. Elting*, 17 Ill. 429; *Rice v. Rock Island R. Co.*, 21 Id. 93. This is also allowed in Pennsylvania: *Cross v. Peach Bottom R. Co.*, 90 Pa. St. 392, relying upon *Gray v. Monongahela Nav. Co.*, 2 Watts & S. 156. So it is held that a change in the termini is not fundamental: *Sprague v. Ill. Riv. R. Co.*, 19 Ill. 174. See also *Ill. Riv. R. Co. v. Zimmer*, 20 Id. 654; *Ross v. C. B. & Q. R. Co.*, 77 Id. 134; and *Delaware R. Co. v. Tharp*, 1 Houst. 149. The last case declares that the subscriber's contract is not impaired unless he is obliged to pay more money upon his subscription. The consolidation of two companies under a charter amendment is fundamental, and releases a dissenting subscriber in either company: *Mowrey v. Cincinnati R. Co.*, 4 Biss. 83; *Clearwater v. Meredith*, 1 Wall. 25; *Pearce v. Madison R. Co.*, 21 How. 441; *Tuttle v. Mich. Air Line*, 35 Mich. 247; *New Jersey etc. R. Co. v. Strait*, 35 N. J. L. 322; *McCray v. Junction R. Co.*, 9 Ind. 358; *Booe v. Junction R. Co.*, 10 Id. 93; *Shelbyville Turnpike Co. v. Barnes*, 42 Id. 498; *Lawman v. Lebanon Valley R. Co.*, 30 Pa. St. 42; see *Clinch v. Financial Co.*, L. R. 4 Ch. Ap. 117; *Dougan's Case*, L. R. 8 Ch. Ap. 540. The majority may bind themselves by acting under such an amendment, and will be estopped by their acts. This will be further noticed below. But equity will restrain the consolidation at the instance of a dissenting stockholder until security is given him for the value of his interest: *Lawman v. Lebanon Valley R. Co.*, 30 Pa. St. 42. A provision in the amendment allowing the majority to accept and thereby bind the dissenting stockholders is unconstitutional: *New Orleans R. Co. v. Harris*, 27 Miss. 517. In Illinois, provided the original object is retained, the majority may bind the minority by consolidating under an amendment: *Sprague v. Ill. R. Co.*, 19 Ill. 174; see *Delaware R. Co. v. Tharp*, 1 Houst. 149; but not if the consolidation wholly changes the character of the enterprise: *Illinois Grand Trunk R. Co. v. Cook*, 29 Ill. 243. A subdivision of a corporation, like a consolidation, is fundamental: *Supervisors of Fulton Co. v. Miss. etc. R. Co.*, 21 Id. 338; *Indiana & Ill. Turnpike Co. v. Phillips*, 2 Penr. & W. 184. A change in the visitorial power in a charitable organization is fundamental, and releases dissenting subscribers: *Printing House v. Trustees*, 104 U. S. 711. An alteration by which the minimum number of subscribed shares necessary is reduced, and a stockholder thus rendered liable on his subscription, when otherwise he would not be, is fundamental: *Old Town etc. R. Co. v. Veasey*, 39 Me. 571. So a privilege to sell the road owned by the corporation is fundamental: *Kean v. Johnson*, 9 N. J. Eq. 407. Authority to run steamboats in connection with a railroad is fundamental: *Hartford etc. R. Co. v. Croswell*, 5 Hill (N. Y.), 383. An amendment radically changing the original scheme, such as by authorizing a lease of the corporate property to another corporation for nine hundred and ninety-nine years, is fundamental, and the corporation will be restrained by equity, at the petition of a dissenting stockholder, from acting thereunder: *Black v. Delaware and Raritan Canal Co.*, 24 N. J. Eq. 455. The following have been held to be not fundamental or radical alterations: A change of the corporate name: *Greeneville etc. R. Co. v. Johnson*, 8 Baxt. 332; *Bucksport etc. R. Co. v. Buck*, 68 Me. 81; in *Clark v. Monongahela Nav. Co.*, 10 Watts, 364, a change of name and power to raise the dams owned by the corporation four feet. In *Wells etc. v. Oregon*

R. & N. Co., 15 Fed. Rep. 561, it is held that where the charter allows the corporation to change its name by an order of the directors, approved by the stockholders, the essential part of the proceeding is the vote of the stockholders, the order of the directors being merely preliminary and directory; but until the contrary appears, the presumption is that action has been taken in the proper manner. An extension of time granted to a corporation within which it may complete its undertaking is not fundamental: *Taggart v. Western R. Co.*, 24 Md. 564, 596, 597; *Agricultural R. Co. v. Winchester*, 13 Allen, 29; *Poughkeepsie etc. Plank Road Co. v. Griffin*, 24 N. Y. 150. In the last case, the corporation was also allowed to commence business, and collect tolls as a turnpike company in the mean while. An authority to issue preferred stock to raise funds to complete the main design of the railroad company is not fundamental: *Everhart v. Westchester etc. R. Co.*, 28 Pa. St. 339. Defects in receiving subscriptions may be remedied without radically affecting the contracts of the stockholders: *Clark v. Monongahela Nav. Co.*, 10 Watts, 364.

STOCKHOLDER MAY LOSE HIS DEFENSE BY LACHES.—The stockholder may lose his defense to his liability on his stock, on the ground that he has never assented to a fundamental amendment, by expressing no dissent, and allowing the corporation to act under the amendment, without seeking to restrain it. The corporation, having acted under the amendment against no express dissent, may have proceeded to expend large sums of money, may have entered into contracts with third parties, and otherwise pledged its credit and involved itself in debt, and it would be exceedingly unjust, under such circumstances, to allow a stockholder, who has slept on his rights, and perhaps never in fact dissented until his subscription is sought to be enforced or an assessment is levied on his stock, to be discharged from his liability because he has never openly declared his assent to the charter alteration. By his quietude, by acting subsequently in the corporation, such as by voting at elections and the like, or by neglecting to enjoin the corporation when it was in his power, he acquiesces to and ratifies the change in the charter. And this is true *a fortiori* when the rights of third persons are involved: *Martin v. Pensacola R. Co.*, 8 Fla. 370; *Memphis Branch R. Co. v. Sullivan*, 57 Ga. 240; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29; *Houston v. Jefferson College*, 63 Id. 428; *Danbury etc. R. Co. v. Wilson*, 22 Conn. 435; *Vermont etc. R. Co. v. Vermont Cent. R. Co.*, 34 Vt. 2; *Hayworth v. Junction R. Co.*, 13 Ind. 348; *Gifford v. New Jersey R. Co.*, 10 N. J. Eq. 176; *Zabriskie v. Hackensack etc. R. Co.*, 18 Id. 178; *Ex parte Booker*, 18 Ark. 338; *Mowrey v. Ind. & Cin. R. Co.*, 4 Biss. 79; *Upton v. Jackson*, 1 Flip. C. C. 413; *Owen v. Purdy*, 12 Ohio St. 79; *Goodin v. Evans*, 18 Id. 150. In *Bedford R. Co. v. Bowser*, 48 Pa. St. 29, it is held that one who has acted in the corporation by voting at the meetings and the like, after an amendment has been acted under, is not released because he never assented to it, although he did not know about it. But in *Old Town etc. R. Co. v. Veazie*, 39 Me. 571, the contrary is held, and on the ground that the requirements of the charter cannot be waived, a stockholder was not deprived of his defense because he had exhibited himself as a shareholder and officer in the corporation, and contributed toward the payment of the expenses.

NO FORMAL ACCEPTANCE IS NECESSARY; ACTS OF CORPORATION ARE EVIDENCE OF ACCEPTANCE OF AMENDMENT.—No formal acceptance of an amendment, such as by a formal vote of the stockholders entered upon the minutes of the corporation, is necessary; but acts of the corporation or its officers under an amendment, and inconsistent with any other hypothesis than that it has been accepted, are evidence of acceptance. The leading case holding

that no formal acceptance is necessary is *United States v. Dandridge*, 12 Wheat. 64, in which Judge Story says: "In relation to the question of acceptance of a particular charter by an existing corporation or by corporators already in the exercise of corporate functions, the acts of the corporate officers are admissible evidence from which the fact of acceptance may be inferred." Therefore it was held that it was not indispensable to show a written instrument or vote of acceptance on the corporation books. See also *Covington v. Covington etc. R. Co.*, 10 Bush, 69. It is the acceptance in fact, and not the formal certificate, that binds; and therefore, if an amendment provides for the acceptance thereof by filing a certificate of acceptance, if the corporation has in fact accepted the amendment by vote or by acts thereunder, it will be bound: *Zabriske v. Cleveland etc. R. Co.*, 23 How. 381; *Cincinnati etc. R. Co. v. Cole*, 29 Ohio St. 126. On the other hand, an acceptance under seal, though strong evidence, is not conclusive as between the corporators: *St. Mary's Church*, 7 Serg. & R. 517.

The question as to when an amendment will be held to be accepted by the acts of the corporation thereunder is necessarily divisible into two parts, namely, when the acceptance will be binding between the corporators, and when and to what extent it will be binding between the corporation and third parties. In the first case, we have seen that the stockholder may lose his defense by laches. Thus where under an amendment, which had never been accepted by a vote of the corporation, but which allowed subscriptions to be received in real estate, subscribers who had thus paid their subscriptions could not recover the land from the vendees to whom it had been sold by the corporation, on the ground that the corporation had no title to the land: *Goodin v. Evans*, 18 Ohio St. 150. Acceptance is presumed from acts of the corporation against all but dissenting stockholders and their privies: *Vermont & Canada R. Co. v. Vermont etc. R. Co.*, 34 Vt. 2, 50, 51; *Owen v. Purdy*, 12 Ohio St. 73; *Lyons v. Orange etc. R. Co.*, 18 Md. 32; *New Orleans etc. R. Co. v. Harris*, 27 Miss. 517. There are cases that dissenting stockholders will be bound, though no stockholders' vote has been taken, where the corporation acts under immaterial amendments: *Barret v. Alton etc. R. Co.*, 13 Ill. 504; *Ill. Riv. R. Co. v. Beers*, 27 Id. 185; *Hope etc. Ins. Co. v. Beckman*, 47 Mo. 93, affirmed in *Hope etc. Ins. Co. v. Koeller*, Id. 129. But in the principal case, in the instance of the second supplement, this is denied on the ground that the minority cannot be deprived of their right of discussing the question in a meeting called for the purpose. Secondly, as between the corporation and third parties, the corporation is bound by its acts under an amendment which are inconsistent with any other hypothesis than that the alteration has been duly accepted, and it will be estopped from setting up that such acts were unauthorized: *Wetumpka & Coosa R. Co. v. Bingham*, 4 Ala. 657; *Palfrey v. Paulding*, 7 La. Ann. 363; *State v. Sibley*, 25 Minn. 387; *Covington v. Covington etc. R. Co.*, 10 Bush, 69; *Vermont & Canada R. Co. v. Vermont Central R. Co.*, 34 Vt. 2; *Bangor etc. R. Co. v. Smith*, 47 Me. 34, holding that there is also a presumption in favor of the acceptance of beneficial grants; *Owen v. Purdy*, 12 Ohio St. 73. In *Bangor etc. R. Co. v. Smith*, 47 Me. 34, it is held that if the amendatory act does not require any formal acceptance, an acceptance may be inferred from acts of the corporation, as against a third party who seeks to show that corporate acts under the amendment are unauthorized. A corporation by the act of consolidating under a general law becomes subject to its provisions: *Shields v. Ohio*, 26 Ohio St. 86; S. C., 95 U. S. 319; *State v. Maine etc. R. Co.*, 66 Me. 488; S. C., 96 U. S. 499; see *New Jersey v. Yard*, 95 Id. 113; S. C., *contra*, in 37

N. J. L. 228. So a corporation is estopped by the acts of its regularly authorized officers or directors; *Smead v. Indianapolis etc. R. Co.*, 11 Ind. 104; *Sumrall v. Mut. Ins. Co.*, 40 Mo. 27. In *Kenton Co. Court v. Bank Lick Turnp. Co.*, 10 Bush, 525, the directors after formally rejecting an amendment proceeded to act thereunder, and thus bound the company to an acceptance of it. But acts such as will bind the company to an acceptance must be corporate acts—acts of the corporation or its authorized agents. The unauthorized acts of individual members of the corporation in taking positions under the new act, or the like, furnish no evidence of assent: *Regents v. Williams*, 9 Gill & J. 365; S. C., 31 Am. Dec. 72; and see the principal case. The corporation binds itself to acceptance by user, and cannot avoid it on the ground of ignorance of the nature and extent of rights against the state which it thereby surrendered: *St. Johns' College v. Purnell etc.*, 23 Md. 629.

WHAT CONSTITUTES ACCEPTANCE WHEN LEGISLATURE RESERVES RIGHT TO AMEND.—In *Zabriskie v. Hackensack etc. R. R. Co.*, 18 N. J. Eq. 185, the chancellor says: "After the effect of the rule established in the *Dartmouth College Case* began to be felt in the states, it was found that by the numerous acts of incorporation, freely and perhaps necessarily granted, great inconveniences resulted, and that provisions incautiously inserted too much restricted the power of future legislatures; and that the laws, which experience showed were necessary to govern corporations in the exercise of their powers, could not be passed. And the legislatures of many states, by degrees and successively, adopted the practice of inserting in acts granting franchises that they might alter, modify, or repeal the act; and also, by general law, provided that all acts of incorporation thereafter passed should be subject to such alteration and appeal." Where authority is reserved in the legislature, either by general law or by special reservation in the charter, to repeal or amend the charters of corporations, the subscriber it is supposed contemplates such provisions as a part of his contract, and assents to alterations made in pursuance of them. And when the legislature, under such a statute or reservation, authorizes the corporation to exercise new franchises materially different from those previously enjoyed, upon a vote of two thirds of the corporators accepting the new privileges, it is held that the dissenting one third of the stockholders will be bound: *White v. Syracuse R. Co.*, 14 Barb. 560; *Schenectady etc. Plank Road Co. v. Thatcher*, 11 N. Y. 102. So, where the directors adopt the amendment pursuant to the act: *Buffalo etc. R. Co. v. Dudley*, 14 Id. 336. So, where such fundamental alteration is passed to take effect upon its adoption by the majority of the stockholders, it binds the non-accepting stockholders from the time of its acceptance in the manner prescribed: *Pacific R. Co. v. Renshaw*, 18 Mo. 213; *Joshyn v. Pacific Mail Co.*, 12 Abb. Pr., N. S., 239.

Thus far it may be contended that the dissenting subscriber is held to no more than his contract. He has agreed to the legislative power over the charter, to the authority to repeal and alter it, and thereby he has, at least impliedly, agreed that the legislature may prescribe that upon a vote of a certain number of his fellows, the remainder shall, notwithstanding their dissent, be bound by the amendment. But the cases go even further, and hold that when under such a reserved power in the legislature an act is passed granting new and material franchises of a radical and fundamental nature to the company or corporation, if it shall choose to exercise them, but not expressly authorizing the majority to accept them, the majority may nevertheless accept and act under such amendments and bind the minority, and a dissenting subscriber will not be released from his subscription: *Durfee v. Old*

Colony etc. R. Co., 5 Allen, 230, 243; *Sprigg v. Western Tel. Co.*, 46 Md. 67; *Jewett v. Valley R. Co.*, 34 Ohio St. 601; *Mowrey v. Indianapolis R. Co.*, 4 Biss. 78; *Bish v. Johnson*, 21 Ind. 299; *Meadow Dam Co. v. Grey*, 30 Me. 551; see *Northern R. Co. v. Miller*, 10 Barb. 260; *Hyatt v. Esmond*, 37 Id. 601, 605; *Troy etc. R. Co. v. Kerr*, 17 Id. 581; *Midland etc. R. Co. v. Gordon*, 16 Me. & W. 803. This seems to be in direct opposition to the principle that no radical or fundamental change in the charter, wherever it is a matter of option with the corporation, can be made without the consent of all and each of the corporators. Mr. Morawetz, in attempting to reconcile this apparent discrepancy, says: "It is not a great stretch of construction to hold that the legislature intended that the alteration should be accepted by vote of the majority, this being the usual method by which corporations express their assent, though it was offered in terms to the corporation." But in *Zabriske v. Hackensack etc. R. Co.*, 18 N. J. Eq. 178, the chancellor, acknowledging the weight of authority as given above, nevertheless denies its soundness. He confesses that so far as the alteration is made by the legislature, in a way to be compulsory on the corporation, the majority may bind the minority by acting thereunder. As, if the legislature "should require the company to build a double track, or widen the draws in a bridge, or exact less fare or toll, these would be within the contract, or would be annexed to it as a condition, and every stockholder would take his stock subject to the contingency of such alteration. But if the change in the act is simply offering the corporation the privilege of entering upon another and a different enterprise, it is not within the condition to the subscription. The only construction to be given is, that the legislature may alter, not that the stockholders may as between each other. The plain object of the reservation in this case was to give the legislature, not a bare majority of the stockholders, power. . . . There is no alternative to the proposition that while the power reserved authorizes the legislature, within certain limits, to make such alterations as they choose to impose, it gives no authority, when the legislature does not impose them, for the majority to adopt such alterations, or enter upon such enterprises as are allowed by the legislature." There are cases which seem to recognize that even under a reservation the majority cannot bind the minority to fundamental changes: *Hanna v. Olacknati etc. R. Co.*, 20 Ind. 30; but may when the alteration is immaterial: *Union Hotel Co. v. Hersee*, 79 N. Y. 454, reversing S. C., 15 Hun, 371. Under a reservation the legislature may repeal the charter without the consent of the corporation, and may pass laws which shall modify their charter materially. And if such amendments are passed compulsorily, and are not mere offers of amendments to the corporation, the corporation must accept and act under them or discontinue business, but the legislature cannot compel the corporation to exercise restricted franchises or additional franchises granted, that is, it cannot restrain the corporation from discontinuing business: *Yeaton v. Bank of Old Dominion*, 21 Gratt. 593; *Perrin v. Oliver*, 1 Minn. 202; *Hyatt v. Whipple*, 37 Barb. 595. And the legislature may give a remedy against the corporation which before did not exist, and the corporation cannot object: *Monongahela Nav. Co. v. Coon*, 6 Pa. St. 379.'

MUNICIPAL CORPORATIONS, AMENDMENTS TO CHARTERS OF, ARE BINDING WITHOUT ACCEPTANCE.—When a public or municipal corporation is formed, no contract is established. The legislature simply delegates a portion of its authority, conferring the powers of local administration upon certain territorial divisions, and forming, for the better execution of those powers, certain quasi corporations, as counties, cities, or towns. They are, to the extent of

their delegated powers, the mere agents of the state. And, in the words of Mr. Dillon: "With the exception of certain constitutional limitations, the power of the legislature over such corporations is supreme and transcendent; it may erect, change, divide, and even abolish them, at pleasure, as it deems the public good to require:" Dillon on Mun. Corp., sec. 54. Therefore, when the legislature passes an amendment to the charter of a municipal corporation which is not within the constitutional limitations upon its power, it takes effect without any acceptance on the part of the corporation: *Girard v. Philadelphia*, 7 Wall. 1; *Terrett v. Taylor*, 9 Cranch, 52; *Broughton v. Pensacola*, 93 U. S. 266; *Brewis v. City of Dubuik etc.*, 13 Fed. Rep. 334; *Barnes v. District of Columbia*, 91 U. S. 540; *Mount Pleasant v. Beckwith*, 100 Id. 514; *Rader v. Southeasterly Road District etc.*, 36 N. J. L. 273; *Mayor etc. of Jersey City v. Jersey City etc. R. Co.*, 20 N. J. Eq. 360; *State v. Brant*, 23 N. J. L. 484; *State v. Troth*, 34 Id. 377; *People v. Morris*, 13 Wend. 325; *Demarest v. Mayor etc. of New York*, 74 N. Y. 161; *Fearing v. Irwin*, 55 Id. 486; *Sloan v. State*, 8 Blackf. 361; *State v. Mayor etc.*, 24 Ala. 701; *People v. Mayor etc.*, 51 Ill. 17; *Guild v. Chicago*, 82 Id. 472; *State v. Palmer*, 10 Neb. 205; *Swett v. Sprague*, 55 Me. 190; *San Francisco v. Canavan*, 42 Cal. 541; *People v. Bradley*, 36 Mich. 447; *Smith v. Adrian*, 1 Id. 495; *State v. Linn Co.*, 44 Mo. 504; *Luehrman v. Taxing District*, 2 Lea, 425; *Lynch v. Lafland*, 4 Coldw. 96; *Vicksburg v. Lombard*, 51 Miss. 111; *State v. Swift*, 11 Nev. 128; *Eagle v. Beard*, 33 Ark. 497; Dillon on Mun. Corp., sec. 85. In *City of St. Louis v. Russell*, 9 Mo. 507, an amendment requiring no acceptance, was, however, accepted by a majority of the voters, and it was held that the city was surely bound by it, but it does not decide such vote to be necessary to bind the municipality. A corporation created for the purpose of maintaining a fire-engine, with the privilege of taxing themselves and the neighboring inhabitants, is a public or quasi municipal corporation, and an amendment to its charter passed by the legislature needs no acceptance: *Cole v. Fire-engine Co.*, 12 R. I. 202. The legislature's power over the municipal corporation is restrained by the provisions of the state constitutions: Dillon on Mun. Corp., sec. 45; *People v. Mayor etc.*, 51 Ill. 17; *People v. Common Council etc.*, Id. 58; and by the federal constitution. Municipal corporations exist in two characters, public and private: *Small v. Danville*, 51 Me. 361, 362; *Richmond v. Long*, 17 Gratt. 379, 380; *Oliver v. Worcester*, 102 Mass. 499; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Touchard v. Touchard*, 5 Id. 307; *Jones v. New Haven*, 34 Conn. 1; *County Commissioners etc. v. Duckett*, 20 Md. 468. In their private character, as the agent of their inhabitants, they contract with third parties, buy and sell property, and enter into various contracts which are within the scope of their powers. The obligation of these contracts, in which the rights of third persons are involved, it is unconstitutional for the legislature to impair by amending the municipal charter: *Broughton v. Pensacola*, 93 U. S. 266; *Milner's Adm'r v. Pensacola*, 2 Woods, 632; *Lansing v. County Treasurer*, 1 Dill. 522; *People v. Hurlburt*, 24 Mich. 44; *Park Commissioners v. Detroit*, 28 Id. 228; *Baile v. Mayor*, 3 Hill (N. Y.), 531; *Commissioners v. Armstrong*, 45 N. Y. 234; S. C., 6 Am. Rep. 70; *Olney v. Harney*, 50 Ill. 453; *City of St. Louis v. Russell*, 9 Mo. 503; *Trustees v. Mayor etc. of Aberdeen*, 13 Smed. & M. 645; *State Board of Education v. Aberdeen*, 56 Miss. 518; *Police Jury v. Shreveport*, 5 La. Ann. 661; *New Orleans v. Hoyle*, 23 Id. 74; *New Orleans R. Co. v. New Orleans*, 26 Id. 478. And it cannot be authorized to engage in private schemes, such as to issue obligations in aid of a work for private use or benefit, for such a franchise is foreign to its nature: *People v. Bach-*

ellor, 53 N. Y. 128; *Weismar v. Village of Douglas*, 64 Id. 91; *Attorney-General v. Eau Claire*, 37 Wis. 400; *Hanson v. Vernon*, 27 Iowa, 28; *Taylor v. Commissioners of Newberne*, 2 Jones Eq. 141.

AMENDMENTS TO MUNICIPAL CHARTER MAY BE PASSED, CONDITIONAL UPON ACCEPTANCE BY VOTE OF INHABITANTS.—It is constitutional, and not a delegation of legislative power, to grant a charter or enact an amendment thereto in which it is provided that it shall not take effect until it is accepted by a vote of "the people," or by a vote of a majority of the inhabitants or voters of the municipality: *Dillon on Mun. Corp.*, sec. 44; *People v. Nally*, 49 Cal. 478; *St. Joseph Township v. Rogers*, 16 Wall. 644; *People v. Warfield*, 20 Ill. 163; *Louisville etc. R. Co. v. Davidson Co.*, 1 Sneed, 637. But see *Parker v. Commonwealth*, 47 Pa. St. 480, and note. It may be left to a vote of "the people:" *Mayor etc. of Brunswick v. Finney*, 54 Ga. 317; *Stone v. Charlestown*, 114 Mass. 214. See *Talbot v. Dent*, 9 B. Mon. 538. The legislature may authorize the electors of a municipality to accept or adopt what sections of a general act incorporating villages shall apply to their village: *Bank of Ononago v. Brown*, 26 N. Y. 467; *State v. Noyes*, 30 N. H. 279. It is not unconstitutional to submit to the majority of the voters of one county whether a portion of another county shall be annexed to the former county: *People v. Nally*, 49 Cal. 478. But because a public law has been submitted to a city, and has been adopted by the city in accordance with the provisions of the law, it does not follow that an amendment to it must also be accepted by the city. The amendment will take effect without acceptance, unless it is specially required: *Swett v. Sprague*, 55 Me. 190; and see the opinion in *Lycoming v. Union*, *post*, p. 575.

WHAT CONSTITUTES ACCEPTANCE OF AMENDMENT WHEN SUBMITTED TO INHABITANTS.—A law which is submitted to the majority of the legal voters will be accepted when the majority of those voting at an election vote in favor of it. It is presumed that the voters voting at an election "held in pursuance of law and upon proper notice," comprise all the legal voters; or that those who did not choose to vote, if there are any, acquiesce in the action of those who do vote: *State v. Binder*, 38 Mo. 450; *People v. Warfield*, 20 Ill. 159, 164; *Louisville etc. R. Co. v. County Court etc.*, 1 Sneed, 637, 692. Where an act amendatory of a charter of a municipal corporation requires the acceptance of a majority of the voters of a city, the vote adopting the same at a township election, the voters of each corporation possessing different qualifications, is void, although the territorial limits of the city and the township are the same: *Foot v. Cincinnati*, 11 Ohio, 408; S. C., 38 Am. Dec. 737. An amendatory act, submitted to the majority of the voters of a city, when it is offered to be voted upon at a general election, must receive a majority of all the votes cast at such election, not merely a majority of all the votes cast for and against the amendment. Thus, where, at the general election, thirteen thousand votes were cast, and only seven thousand of the voters voted upon the amendment, of which five thousand votes were in favor of its adoption, the number of votes in its favor not being a majority of all the votes cast, the amendment was not accepted: *State v. Winklemeier*, 35 Mo. 103; *People v. Wiant*, 48 Ill. 263. See also *Damon v. Granby*, 2 Pick. 245, 255. But if, when the amendment is submitted to two thirds of the qualified voters, a special election is called, and two thirds of the qualified voters who vote at that election vote in favor of it, it will be accepted: *State v. Mayor etc.*, 37 Mo. 270. There are presumptions which arise in favor of the validity of such acceptance of amendments, especially where the rights and interests of third persons become involved by the action of the municipality under the charter. Thus, an offi-

cial declaration that the required two-thirds vote of acceptance was duly cast, is binding on the city in an action against it on bonds issued by authority of the amendment. The objection is available only to restrain the issuance thereof: *City of Vicksburg v. Gardner*, 51 Miss. 111. See *Milner's Adm'r v. Pensacola*, 2 Woods, 632. And where all the provisions for adopting the amendment were followed except sealing, the city having no seal, it was held that the provision for sealing was merely directory, and the city was estopped from raising the objection: *Brennan v. City of Weatherford*, 53 Tex. 330; S. C., 37 Am. Rep. 758. A subsequent act of the legislature recognizing the amendment as in force proves at least *prima facie* the due acceptance thereof: *State v. Tooney*, 26 Minn. 262.

THE PRINCIPAL CASE IS CITED IN *Illinois Riv. R. Co. v. Zimmer*, 20 Ill. 663, which is a decision on the general principle that act of user by a corporation under an amendment is evidence of acceptance of it. The court speaks of the principal case as follows: "Exceptional cases may no doubt be found, where a majority of the shareholders in number and interest have denounced and opposed an amendment so soon as they learn of its enactment, and the acts of user are limited and equivocal, as in the case of *Commonwealth v. Cullen*, 13 Pa. St. 133." From this it is to be presumed that the judge (Caton, C. J.) overlooked the treatment of the second supplement in the principal case, where it is decided that when even a minority expressly object, and the acts of user have involved no rights of third persons, the amendment will not be accepted unless a stockholders' vote has been held. In *Owen v. Purdy*, 12 Ohio St. 73, the principal case is cited to the point that acceptance is to be inferred from acts of the corporation inconsistent with any other hypothesis; and in *Pennsylvania College Cases*, 13 Wall. 214, to the point that amendments to a charter, passed with the assent of the corporation and duly accepted by corporate vote as amendments to the original charter, cannot be regarded as impairing the obligation of the contract created by the original charter.

CHARTER OF CORPORATION IS CONTRACT, the obligation of which can not be impaired by an amendment not consented to by the incorporators: See *Brown v. Hummel*, 47 Am. Dec. 431, and *Monongahela Nav. Co. v. Coon*, Id. 474, and notes referring to prior cases in this series.

ASSENT OF CORPORATION TO ACTS DONE ON ITS ACCOUNT may be inferred from its acts in the same manner as in case of a natural person: See *Bank of the State v. Comegys*, 46 Am. Dec. 278; *Regents v. Williams*, 31 Id. 72.

FAILURE TO ELECT OFFICERS does not necessarily effect a dissolution of a corporation: See *Cahill v. Kalamazoo Mut. Ins. Co.*, 43 Am. Dec. 457, and note referring to the prior cases in this series.

QUO WARRANTO, PLEADING AND PRACTICE IN: See *State v. Real Estate Bank*, 41 Am. Dec. 109, and note collecting the prior cases.

ANSWER IN EQUITY AS EVIDENCE FOR DEFENDANT.—Answer to a bill in equity that is unsupported by proof, and not responsive to the bill, but sets up matters in avoidance, must be considered as untrue, and out of the case: *O'Brien v. Elliott*, 32 Am. Dec. 137. Answer of one defendant is not evidence against his co-defendant: *Jones v. Hardesty*, Id. 180. Averments in answer not responsive to bill and seeking to contradict a writing by parol is inadmissible: *Clark v. Flint*, 33 Id. 734. An unsworn answer to a bill is not evidence for any purpose, but performs merely the office of a pleading: *Willie v. Henderson*, 38 Id. 120. When the answer does not allege facts within the personal knowledge of defendant, it is not within the rule admitting an answer as evidence: *Dugan v. Gittings*, 43 Id. 306. One positive witness and

other strong corroborating circumstances are sufficient to disprove the answer of the defendant, but the circumstances must be such that, standing alone, a reasonable conclusion as to the truth of the fact might be deduced from them: *Maddox v. Sullivan*, 44 Id. 234. The principal case is cited to the point that an answer which is responsive to the bill is evidence for the defendant, and plaintiff can countervail it only by the testimony of two witnesses, or by that of one witness with strong corroborating circumstances, in *Merby v. Gref*, 21 Pa. St. 256, and *Pusey v. Wright*, 31 Id. 395.

HILEMAN v. BOUSLAUGH.

[13 PENNSYLVANIA STATE, 244.]

RULE IN SHELLEY'S CASE IS LAW IN THIS STATE, which, by turning a limitation for life, with remainder to heirs of the body, into an estate-tail, is the handmaid of the statute for barring entails; and where the limitation is to heirs general, it cuts off what would otherwise be a contingent remainder, destructible only by a common recovery.

WORDS OF LIMITATION IN WILL, USED IN IMPROPER SENSE, may be explained by the context so as to exclude the devise from the rule in *Shelley's Case*, which operates upon the intention when ascertained; but where the intention has been ascertained by the application of the ordinary rules of construction, and is found to be within the rule, the rule applies without exception.

IN WILL, LEGAL FORCE OF WORD "HEIRS" MAY BE CONTROLLED BY CONTEXT evincing such a demonstrative intention to misapply it as cannot be mistaken; in an executed conveyance, never.

OMISSION OF LIMITATION OVER IN DEFAULT OF ISSUE, which was made in *Shelley's Case*, is immaterial as affecting the application of the rule in *Shelley's Case*.

SUPERADDED WORDS OF LIMITATION WHICH IMPORT SAME COURSE OF DESCENT are inoperative even in a will.

RULE IN SHELLEY'S CASE GIVES ANCESTOR ESTATE FOR LIFE, in the first instance, and by force of the devise to his heirs, general or special, the inheritance also, by conferring the remainder on him, as the stock from which alone they can inherit.

EXPRESS LIMITATION OF HEIRS OF BODY fills up the measure of the intention, and leaves nothing to be supplied by intendments from added limitations.

EXECUTED CONVEYANCE OF LEGAL ESTATE VESTS LEGAL TITLE IN MARRIED WOMAN, subject to the husband's power to divest it by disagreeing to the conveyance.

INSTRUMENT PASSING PROPERTY IN DONOR'S LIFE-TIME, although of alleged testamentary character, being not absolutely a will, must be a deed, for there is no middle ground.

CONSTRUCTION OF DEED CANNOT BE INFLUENCED BY ANYTHING IN WILL preceding it, which, being inoperative till testator's death, is no evidence of immediate intention, though it might bear on the result.

ACTUAL INTENTION CONTRARY TO LEGAL EFFECT OF DEED, though apparent from that instrument itself, will not affect the operation thereof.

GRANT OF REAL PROPERTY TO MARRIED WOMAN for life, and thereafter to the heirs of her body, and to them and their heirs and assigns forever, creates in her an estate-tail descendible to her eldest son.

EJECTMENT, by Jacob R. Bouslaugh against Henry Hileman, and Michael Hileman and his wife. Plaintiff was the eldest son of Esther Bouslaugh, and claimed the land in controversy as tenant in tail under a deed from his grandfather, Joseph Rentch, to his mother, in which, in consideration of ten shillings and the good-will and affection which he bore his daughter, "and as a lagaicee to her," Joseph Rentch conveyed the said real estate to Esther Bouslaugh "during her natural life, and after her decease to the heirs of her body, and to them and their heirs and assigns forever." Joseph Rentch in his will referred to this conveyance as follows: "I have likewise conveyed and made over to my daughter, Esther Bouslaugh, two hundred and sixteen acres of land, as a part of her lagaice, which I have charged her the sum of two hundred and sixty pounds for, and have discharged the same in lew of the two hundred and sixty pounds I have willed my three daughters heretofore mentioned." Esther died before the institution of this suit. She had given birth to nine children, all of whom were either living or had representatives living at the time of this suit. One of her daughters married Henry Hileman, one of the defendants in this action, and both were living on the land in question. Another daughter married Michael Hileman, the other defendant. Esther devised the land in question to the wife of Michael Hileman. The point of the case was, whether the said Esther took, under the said deed, an estate-tail, or an estate for life only. If she took an estate-tail, it descended to the eldest son, the present plaintiff, *secundum formam doni*. Whereas the defendants contended that she took a life estate, in which case the fee vested, by the terms of the deed, in all her nine children, and the plaintiff was entitled, at all events, to a ninth of the premises only. The parties agreed upon and submitted a case stated, upon which judgment was rendered, to the effect that Esther Bouslaugh took an estate-tail under the said deed, and plaintiff, as her eldest son, was entitled to recover the land described therein. The defendants brought error.

Miles, for the plaintiffs in error.

Bell, for the defendants in error.

By Court, GIBSON, C. J. The rule in *Shelley's Case*, 1 Co. 93, illy deserves the epithets bestowed on it in the argument. Though of feudal origin, it is not a relic of barbarism, or a part of the rubbish of the dark ages. It is part of a system; an artificial one, it is true, but still a system, and a complete one.

The use of it, while fiefs were predominant, was to secure the fruits of the tenure, by preventing the ancestor from passing the estate to the heir, as a purchaser, through a chasm in the descent, disincumbered of the burdens incident to it as a heritage; but Mr. Hargrave, Mr. Justice Blackstone, Mr. Fearne, Chief Baron Gilbert, Lord Chancellor Parker, and Lord Mansfield, ascribe it to concomitant objects of more or less value at this day; among them, the unfettering of estates, by vesting the inheritance in the ancestor, and making it alienable a generation sooner than it would otherwise be. However that may be, it happily falls in with the current of our policy. By turning a limitation for life, with remainder to heirs of the body, into an estate-tail, it is the handmaid, not only of *Taltarum's Case*, but of our statute for barring entails by a deed acknowledged in court; and where the limitation is to heirs general, it cuts off what would otherwise be a contingent remainder, destructible only by a common recovery. In a masterly disquisition on the principles of expounding dispositions of real estate, Mr. Hayes, who has sounded the profoundest depths of the subject, is by no means clear that the rule ought to be abolished even by the legislature; and Mr. Hargrave shows, in one of his tracts, that to ingraft purchase on descent would produce an amphibious species of inheritance, and confound a settled distinction in the law of estates. It is admitted that the rule subverts a particular intention in perhaps every instance; for, as was said in *Roe d. Thong v. Bedford*, 4 Mau. & Sel. 362, it is proof against even an express declaration that the heirs shall take as purchasers. But it is an intention which the law cannot indulge consistently with the testator's general plan, and which is necessarily subordinate to it. It is an intention to create an inalienable estate-tail in the first donee; and to invert the rule of interpretation, by making the general intention subservient to the particular one. A donor is no more competent to make tenancy for life a source of inheritable succession than he is competent to create a perpetuity, or a new cannon of descent. The rule is too intimately connected with the doctrine of estates to be separated from it without breaking the ligaments of property. It prevails in Maryland, Georgia, Tennessee, as well as perhaps in most of the other states; and it prevailed in New York till it was abolished by statute. We have no such statute, and it has always been recognized by this court as a rule of property.

A deviser who uses words of limitation in an improper sense may so explain the meaning of them by other words in the

context as to exclude his devise from the rule; for it operates only on the intention, when it has been ascertained, not on the meaning of the words used to express it. The ascertainment is left to the ordinary rules of construction peculiar to wills; but when the intention thus ascertained is found to be within the rule, there is but one way; it admits not of exceptions. It is to the application of those ordinary rules, sometimes controlling the meaning on weak and inconclusive grounds, and not to the nature of the particular rule—which is, in truth, not a rule of construction—that the discrepancy of the decisions is attributable. The question on a will is not whether the testator intended that the rule should not operate, for that is not subject to his power, but whether he used the words “heirs of the body” as synonymous with the word “children,” or its proper equivalent. By not adverting to this, the rule has sometimes been thought to be a flexible instead of an unbending one. But can technical words of limitation in an executed conveyance of the legal estate by a common-law deed be qualified by implication or the context? In molding legal conveyances to give effect to executory trusts in marriage settlements, a chancellor interprets the deed as freely as he would interpret a will; because it contains no more than hints or instructions for a formal settlement; and he consequently treats an executory limitation to heirs of the body as a direction to dispose of the estate at law, in strict settlement, by giving estates to first and other sons in tail. Lord Macclesfield held, in *Trevor v. Trevor*, 1 P. Wms. 622, that the case is stronger on articles than on a will; because articles are only heads or minutes of the agreement; and that they ought to be so modeled in executing them as to give effect to the actual intention. But it has never been supposed that technical words of limitation in a conveyance—and heirs of the body are such—can be controlled by anything whatever. It was held in *Roe v. Bedford*, 4 Mau. & Sel. 362, on the authority of Lord Hardwicke, in *Bagshaw v. Spencer*, 1 Ves. sen. 142, that even in a devise of legal estate the words must be taken as they stand, according to their strict legal signification; and the same thing, essentially, was said by Chief Justice Bridgman, in *Rundale v. Eeley*, Carter, 170.

It is said in Sheppard's Touchstone to be peculiar to wills that a devise is to be liberally expounded, in order to pursue the meaning of the deviser, who may, for want of assistance, have omitted the legal and proper phrases; insomuch as to

sustain a fee-simple without words of inheritance, or a fee-tail without words of procreation, or an estate by implication; and that a will is to be construed rather on its circumstances than on any principle of law. On this distinction was ruled *Ellmaker v. Ellmaker*, 4 Watts, 89, in which the word "dower," embracing, in the popular sense, everything which belongs to the widow of an intestate husband, was restrained, in a deed, to real estate. What, then, is the legal meaning of the words "heirs of the body?" The word "issue," which was held, in the *Earl of Oxford v. Churchill*, 3 Ves. & Bea. 67, to be ambiguous in a will, is always a word of particular designation in a deed; and it follows that "heirs of the body" are words of limitation in it. In *King v. Melling*, 1 Vent. 226, Twisden, J., said that the words "issue of the body," in a conveyance executed, make not an estate-tail, more than would the word "children;" and Hale, J., said that, in creating an estate-tail by will, the intention is the law of the case; but that in a conveyance by deed, the word "heirs" is a term of art, and the cause was ruled on that ground. In a will, the legal force of the word "heirs" may be controlled by the context evincing such a demonstrative intention to misapply it as cannot be mistaken; in an executed conveyance, never. It is significant that, in the eighty-two cases comprised in the analytical tables of Mr. Hayes, Shelley's alone was on a deed; and in that the question was not on the meaning of the words, but on the power of the rule to control it. Since then, the present is the only one, in England or America, except *Baughman v. Baughman*, 2 Yeates, 410, which has come before the court on a conveyance executed; and the latter seems to have been ruled on the distinction now taken. The question, in every other, has been on a will, or an appointment in the nature of a will. Mr. Hayes remarks that he introduced *Shelley's Case* into his tables only because it had given name to the rule. But it is essentially the case before us. The limitations were to A for life—remainder to the use of the heirs of his body, and to the heirs male of the body of such heirs male; and in default of issue, to the heirs male of the body of B. In our case, the limitations are to Esther Bouslaugh, during her natural life, and after her decease, to the heirs of her body, and to them and their heirs and assigns forever. The difference is, that there is a limitation over in the one case, and not in the other; the immateriality of which will be shown.

But nothing is better established, by decision, than that superadded words of limitation, which import the same course of

descent, are inoperative even in a will. The principle is sustained by *Goodright v. White*, 2 W. Black. 1010; *Henry v. Purcel*, Id. 1002; *Burnet v. Coby*, 1 Barn. 367; *Goodright v. Pullyn*, 2 Ld. Raym. 1437; *Wright v. Pearson*, 1 Edw. 119; *Denn d. Geering v. Shenton*, 1 Cowp. 410; *Measure v. Gee*, 5 Barn. & Ald. 910; and *Kinch v. Ward*, 2 Sim. & Stu. 409. In *Goodright v. Pullyn*, *supra*, the limitations were to the ancestor for life, and to the heirs male of his body, lawfully to be begotten, and his heirs, forever—words as strong as those in the deed under consideration—yet they were held to make an estate-tail even in a will. In *Carter v. McMichael*, 10 Serg. & R. 429, the same effect was given to a devise to a son, expressly for life; and to the heirs male of his body at his death, and to the heirs and assigns of such heir male—exactly the superadded words here. So in *Parson v. Lefferts*, 3 Rawle, 59, where the devise was to a son during life, and if he should leave lawful issue, then to them and their heirs and assigns forever. In these cases, the rule in *Shelley's Case* was enforced, though the superadded limitations in fee attempted to be ingrafted on words of procreation, no more imported the same course of descent than do the superadded words in the limitation before us. But whatever might be their effect as proof of a misapplication of technical words in a will, where an intention to control their legal effect may be implied, they have no effect in a deed, for it admits not of implication. The only apparent exception to this is found in *Pibus v. Mitford*, 1 Vent. 372, where there was an implication of an intermediate use of the interest remaining in a grantor of a future use. Such an implication can arise, however, only on a deed of bargain and sale, or a covenant to stand seised.

No greater effect is attributable to the want of a limitation over, which evinces no more than an intent that the inheritance shall be in the particular tenant, if he shall have issue. But even where the question stands on a will, such a limitation has no other effect on the life estate than, in the absence of express words of procreation, to turn it into an estate-tail.

The operation of the rule in *Shelley's Case* is just this: It gives the ancestor an estate for life, in the first instance, and by force of the devise to his heirs, general or special, the inheritance also, by conferring the remainder on him, as the stock from which alone they can inherit, and the source alone from which their inheritable blood can spring. Thus a devise to one for life, with remainder to the heirs of his body, gives him an estate-tail in possession by the merger of his life estate

in the inheritance; but a devise to him for life, remainder to another for life, remainder to the heirs of the body of the first donee, gives him an estate for life in possession, and by reason that the intermediate life estate prevents the merger, an estate-tail in expectancy. This solution, of what might else be a difficulty, is given by Mr. Hayes in a manner so simple and satisfactory as to leave no doubt of its accuracy. In the cases quoted, there was not only an express limitation to heirs of the body, but an implication of the same limitation from a limitation over. But can the latter be more operative than the former? Where there is an express limitation to heirs of the body, there is no room for an implied one. That it is supposed to fill up the measure of the intention, and to leave nothing to be supplied by intendments, is sustained by *Higham v. Baker*, Cro. Eliz. 16; *Bamfield v. Popham*, 1 P. Wms. 54; *Blackborn v. Edgley*, Id. 600; *Attorney-General v. Sutton*, Id. 760; and *Glover v. Clatches*, cited in *Higham v. Baker*, *supra*. In its essential properties, therefore, *Shelley's Case* is the case before us; for could there be an implication from a limitation over in a legal conveyance, the consequence would be the same. Indeed, the limitation over does not seem to have been considered an element of that case.

The argument that the estate limited to the mother is equitable, and that the limitation to the heirs of her body is legal, is unfounded. A wife may purchase without her husband's assent; and, although he may divest her estate by disagreeing to the purchase, the title is in her in the mean time. In this instance the husband did not disagree, and she took the legal estate as if she were a *feme sole*. Equitable limitations to married women are sometimes distinguished from legal limitations—certainly executory trusts are—but we have here an executed conveyance of a legal estate, which, as the husband did not disagree to it, vested the property in the wife subject to his power to divest it.

It is decisive against the alleged testamentary character of the instrument that it is not absolutely a will. It must be exclusively so, or it is a deed; for there is no middle ground; and no will, as this instrument did, ever passed the property in the donor's life-time. *Attorney-General v. Jones*, 3 Price, 368, is more than apocryphal. It was not only decided by a divided court, but one of the four judges declared that had not the instrument contained a power of revocation, he would not have concurred. They would then have stood two to two, and the case, as a precedent, would have been neutralized. But it

would be strange if every deed which contains such a power should therefore be deemed a will. Mr. Jarman, the editor of *Powell on Demises*, and himself the author of a treatise on the subject, scarcely conceals his dissatisfaction at the decision. It would expunge a rudimental distinction from the law of property. Nor is the construction of the deed to be influenced by anything in the will that preceded it, which, being inoperative till the testator's death, would be no evidence of intermediate intention. even if it might bear on the result. To show an actual intention contrary to the legal effect of the deed would be to show nothing. The deed itself shows it; but it is an intention forbidden by the law.

It is the opinion of the court that Esther Bouslaugh took an estate-tail general, which at her death descended to Jacob Bouslaugh, the plaintiff, who is consequently entitled to recover.

Judgment affirmed.

COULTER and BURNSIDE, JJ., dissented.

RULE IN SHELLEY'S CASE.—The prior cases in this series are collected in *Kay v. Connor*, 49 Am. Dec. 690. The principal case is cited as confirming the rule in *Shelley's Case*, as the law in Pennsylvania: *George v. Morgan*, 16 Pa. St. 104; *Steacy v. Rice*, 27 Id. 83. In *Auman v. Auman*, 21 Id. 348, it is cited to the point that this rule controls the donor's intention, and gives a different operation from that designed by him; and in *Braden v. Cannon*, 24 Id. 172, to the effect that a deviser may so explain the words he has used as to exclude the devise from the operation of the rule. The principal case is distinguished in *Gernet v. Lynn*, 31 Id. 99, S. C., 2 Phila. 314, which was held not to fall within the rule, as the estate was not limited to the heirs of the body of the first taker.

WORD "HEIRS" IS TECHNICAL WORD, and always construed as a word of limitation according to the rule in *Shelley's Case*, unless controlled in its legal effect by the context: *Kay v. Connor*, 49 Am. Dec. 690; see also *Kennon v. McRoberts*, 1 Id. 428; *Ward v. Stow*, 27 Id. 238; *Mowatt v. Carow*, 32 Id. 641; but see *Myers v. Anderson*, 47 Id. 537.

TECHNICAL WORDS OF LIMITATION IN DEED cannot be controlled by the context. The principal case is cited upon this point in *Powell v. Board of Domestic Missions*, 49 Pa. St. 59.

McMAHAN v. McMAHAN.

[13 PENNSYLVANIA STATE, 376.]

PAROL PARTITION, IF FAIR AND EQUAL, AND EXECUTED BY CORRESPONDING POSSESSION IS GOOD, though some of the tenants be under coverture, and others of them elect to hold their purparts, as before, by community of possession.

ABSENT CO-TENANT NOT ASSENTING TO PARTITION may repudiate it by demanding a new partition of the whole tract, or he may adopt it by ratifying the acts of one who has assumed to act for him in such partition. **BY RATIFICATION, DOINGS OF SELF-CONSTITUTED AGENT** become, in contemplation of law, the acts of the principal, with all the consequences that follow the same act done by previous authority; unless it might operate to defeat mesne rights acquired *bona fide*, by third persons, or subject them to some loss, to which otherwise they would not be liable.

ADMISSIONS WHICH HAVE BEEN ACTED UPON BY OTHERS ARE CONCLUSIVE against the party making them, and will bar every attempt to erect a defense upon their alleged falsity.

IT IS NO BAR TO RATIFICATION OF UNAUTHORIZED AGENCY that self-constituted agent has been allowed, by laches of his principal, to enjoy, for a series of years, his principal's property.

IT IS SUFFICIENT PART PERFORMANCE OF ORAL CONTRACT TOUCHING TITLE OF LANDS to found a claim for specific performance thereof and avoid the bar of the statute of frauds, when one in prior possession of a portion of a tract of land remains in full possession of the whole tract under an oral agreement of partition awarding to him such full possession.

ONE OF TWO CO-TENANTS WHO REMAIN CO-TENANTS after their other co-tenants have become tenants in severalty by partition, may maintain an action of ejectment against his co-tenant, after a simple denial of his right to participate in the enjoyment of the land, upon the doctrine of constructive ouster, and need not join as defendants, those who have become tenants in severalty.

CO-TENANT SEEKING TO RECOVER FROM HIS CO-TENANT HIS PORTION of the common property which has been for a time in the possession of the defendant may defalk the profits received by the defendant against the amount of debts paid by the latter for the former.

COURT MAY MOLD VERDICT so as to meet the facts of the case and the ascertained conclusions of the jury.

EJECTMENT by Daniel McMahan against John McMahan. Benjamin McMahan, the father of the parties to the action, died seised of a tract of land, and leaving five surviving children. While the plaintiff Daniel was absent, the four remaining children divided the plantation, allotting a fifth part thereof to each; except that John, the defendant, who stated that he had paid certain debts for Daniel, the plaintiff, and desired that Daniel's share should be laid off with his own, received two undivided fifths. This action is now brought by Daniel to recover his share from John, affirming the parol partition. The remaining facts are apparent from the opinion of the court. The jury returned two written verdicts. The first was: "We all agree that the said Daniel McMahan is to have twenty-eight acres and forty perches of the two fifths of the land now in possession of John McMahan, so as to let John McMahan have all his buildings on the said John's part, and neither of them to pay anything for rent or judgments." This verdict

being rejected by the court and the jury sent back, they returned their second verdict as follows: "We find for the plaintiff the one half of the undivided two fifths, so as to leave the buildings on the defendant's part, and neither to pay any back claims or rents." The court then inquired of the jury whether by the "two fifths," mentioned in their verdict, they referred to the fifty-six acres and eighty perches described in the writ; and the jury answering in the affirmative, the court ordered the verdict to be so entered, and the verdict was entered accordingly by the prothonotary. Defendant brought error.

Fisher, for the plaintiff in error.

Benedict and Orbison, for the defendant in error, who were not heard by the court.

By Court, BELL, J. The proof is plenary, and the jury has found, in accordance with it, that, in the year 1830, all the parties holding an interest in the real estate which was of Benjamin McMahan, the elder (excepting his son Daniel), made a parol partition of it, by which the portion of each was set apart by metes and bounds, distinctly marked on the ground, save the purparts of John and Daniel, and these, at the instance and in pursuance of the express request of John, were thrown together in common. This partition was followed by actual possession, each tenant entering on the part allotted to him—John holding the only undivided portion in his own right, and as the representative of his absent brother Daniel.

Had the latter been present and actually assenting to this proceeding, no question could be admitted of its entire validity; for it is long since settled that such a division, if fair and equal, executed by a corresponding possession is good, though some of the tenants be under coverture, and others of them elect to hold their purparts, as before, by community of possession: Litt., sec. 250; Co. Lit. 169a, 180, 267a; *Docton v. Priest*, Cro. Eliz. 95; *Ebert v. Wood*, 1 Binn. 216 [2 Am. Dec. 436]; *Bavington v. Clarke*, 2 Penr. & W. 115 [21 Am. Dec. 432]; *Zouch v. Parsons*, 3 Burr. 1801; *Calhoun v. Hays*, 8 Watts & S. 127 [42 Am. Dec. 275]; Act of fifth of February, 1821; Allnatt on Part. 15, 20. The effect of such an election is to continue the relation before subsisting between all who join in it, while the other parties are constituted tenants in severalty, by an act so unequivocal that the law finds no danger in recognizing and sanctioning it.

But Daniel was neither present nor assenting to the arrangement made by his brothers; nor had he authorized John to

represent him in the transaction. He was, consequently, not bound by it, and might at his option repudiate it by demanding a new partition of the whole tract, irrespective of the former division, and regardless of the long-continued possession under it. On the other hand, he may adopt all the features of that division by the simple recognition of the acts done by John in his name; for the maxim is, that subsequent assent to an assumed agency is equivalent to a precedent authority. By such ratification, the doings of the self-constituted agent become, in contemplation of law, the acts of the principal, with all the consequences that follow the same act done by previous authority; unless, indeed, it might operate to overreach and defeat mesne rights acquired *bona fide*, by third persons, or subject them to some loss or penalty to which otherwise they would not be liable: *Clark's Ex'rs v. Van Riemsdyk*, 9 Cranch, 153, 161; *Delafield v. The State of Illinois*, 26 Wend. 192, 226; *Wilson v. Tammon*, 6 Man. & G. 238, 244; *Hinman v. Cranmer*, 9 Pa. St. 40; 1 Am. Lead. Cas. 420 et seq., in note; an effect which cannot be attributed to the ratification in this instance—evidenced by the institution of the present action. On the contrary, its result is to fortify and establish rights founded in the participation of the agent, and which he is now attempting to destroy.

It is, however, objected there is no evidence that John assumed to act as Daniel's representative; or if he did, there was no entry by him, in pursuance of the partition; and consequently, so far as he is concerned, it is within the statute of frauds. But the plaintiff in error is mistaken in both these points. The evidence is full that, asserting an assumed obligation to pay certain debts due from Daniel, wherefore he had an interest in Daniel's share of the land, as security for the proposed outlays, John, acting as the agent of Daniel, preferred a request that the purpart of the latter should be laid off in connection with his own share. This was acceded to by the other owners, on his promise to stand between them and Daniel—a promise in which they seem to have put the fullest reliance when carrying out the family arrangement. This of itself is sufficient to estop John from pursuing his present purpose to impeach the partition on the ground of Daniel's non-participation of it; for admissions or assertions that have been acted on by others are conclusive against the party making them, and will bar every attempt to erect a defense upon their alleged falsity: 1 Greenl. Ev., secs. 207, 208. Indeed, John seems to have been the principal actor in bringing about a

division of his father's land, from which, doubtless, he promised himself an advantage; and yet, strangely enough, he now assumes towards it an attitude of hostility, not because his brother repudiates it, but in an effort to defeat his assent to it; and this, too, upon, to me, the incomprehensible notion that by laches, which consists only in permitting John to enjoy the occupancy of his brother's share for a series of years, the latter is forbidden to confirm the acts of the former by some unexplained equity residing in the quondam agent. Had Daniel, after the lapse of time which has intervened here, attempted to reverse the partition made, in his absence, by his brothers and sisters, and thus grasped at a share of the improvements made by each of them on their several allotments, I could have imagined the ground of inequity charged against him; but I am totally at a loss when the accusation is made to rest on his full recognition of their acts, and his disclaimer of all right to participate in their improvements.

I cannot avoid adding that, in this business, so far as we may judge from the record, John stands in a most unamiable light. He has been permitted to enjoy, for years, the patrimony of his brother, specially set apart on his own suggestion and assumption of creditorship; and now, when the long-absent reappears to claim his right, subject to the arrangements made for him, and under the conception of every just demand residing in the agent, he is told that the only path to a successful vindication of his title lies over the ruins of a family compact, in the faith of which his relatives have lived and died. I cannot but rejoice that we are not compelled by any abstract rule of law to countenance a proposition so fraught with injustice, not only to the plaintiff below, but also to those who have expended their means in full reliance upon the promises of the defendant.

The attempted interposition of the statute of frauds is also without effect. Even admitting an actual entry by the defendant, upon the purparts allotted to him and Daniel, was necessary to consummate the partition—a position I by no means concede—we have here ample evidence of such exclusive occupancy. True, the defendant had a foothold, in his father's time, and by his permission, in a small portion of the tract; but it was not until after the partition made, he entered upon the enjoyment of the whole fifty-six acres, eighty perches; and it is not denied that this entry was by virtue of and in conformity with the partition. Besides, John's prior restricted occupancy, on the death of his father, assumed the condition

of a possession in common with the other tenants—*per my et per tout*; and his subsequent distinct holding is referable alone to the actual division then made. The case is, therefore, strictly within the rule which looks to part performance of an oral contract touching the title of lands, as essential to found a claim for a specific performance of it.

At the time, then, of the institution of this suit, all the owners of this tract of land stood in the relation of tenants in severalty, in respect to each other, except John and Daniel, who, by their own choice, continued to be tenants in common of that portion assigned to them. As a necessary consequence, the objection that this action should have been brought against all of the heirs, fails with the assumption of a continued joint holding, upon which it is bottomed. The joint possession having been severed by a valid act, and John being thus left in the position of one tenant in common claiming in exclusion of his fellow, is subject, alone, to the suit of the excluded tenant. That this suit may be by an action of ejectment, after a simple denial of his right to participate in the enjoyment of the land, upon the doctrine of constructive ouster, is established by *Lau v. Patterson*, 1 Watts & S. 184, and many other precedents.

What the court said to the jury on the subject of Daniel's right to defalk the profits received by John, against the amount of debts paid by the latter for the former, is quite correct. Indeed, no exception was taken to it on the argument.

The bills of exception to evidence are subordinate to the general principles already discussed, and are ruled by them. There is nothing in any of the bills requiring distinct discussion.

By molding the verdict so as to meet the facts of the case and the ascertained conclusions of the jury, the court did no more than was incumbent on it to do. What was said of "back claims or rents," may, if necessary, be rejected as surplusage, though I by no means intend to say this is essential.

By the record it appears the judgment was entered omitting that portion of the verdict.

The errors assigned, and not specifically noticed, were, very properly, not urged on the argument.

Judgment affirmed.

COULTER, J., dissented.

PAROL PARTITION, if executed and not fraudulent, is valid. See *Lynch v. Baxter*, 51 Am. Dec. 735, and cases in this series cited in the note thereto. The principal case is cited as establishing the validity of a voluntary parti-

tion, in *Darlington's Appropriation*, 13 Pa. St. 430; *Rider v. Maul*, 46 Id. 378; *Williard v. Williard*, 56 Id. 127.

PART PERFORMANCE SUFFICIENT TO TAKE PAROL CONTRACT out of the statute of frauds: See *Box v. Stanford*, 51 Am. Dec. 142, and note referring to prior cases in this series.

OUSTER BETWEEN CO-TENANTS, WHAT CONSTITUTES: See *Jones v. Weathersbee*, 51 Am. Dec. 653, with cases cited in note thereto. The principal case is cited to sustain the proposition that maintaining exclusive occupation and use of land is equivalent to actual ouster, in *Cumberland Valley R. R. Co. v. McLanahan*, 59 Pa. St. 30.

RATIFICATION OF AGENT'S ACTS, EFFECT OF: See *Clealand v. Walker*, 46 Am. Dec. 238, citing prior cases.

MODIFICATION OF VERDICT BY COURT, HOW FAR ALLOWABLE: See *Settle v. Alison*, 52 Am. Dec. 393; *Rigg v. Cook*, 46 Id. 462; *Hutchinson v. Kelly*, 30 Id. 250; *Walters v. Jenkins*, 16 Id. 585; *Rew v. Barker*, 14 Id. 515; *Friedly v. Shuts*, 11 Id. 691; *Little v. Larrabee*, Id. 43; *Apthorp v. Backus*, 1 Id. 26.

ADMISSIONS ACTED UPON BY OTHERS CONCLUSIVE AGAINST PARTY MAKING THEM.—In the note to *Abney v. Kingsland*, 44 Am. Dec. 491–497, the cases in this series upon the admissibility of the declaration of former owners of realty are cited. False representations as to credit of purchaser of goods are admissible to impeach the sale: *Thompson v. Rose*, 41 Id. 121, and note. See also remarks on admissions in general, in note to *Richardson v. Richardson*, 30 Id. 544.

PROFITS RECEIVED BY CO-TENANT, when may be recovered and when set off by other co-tenant: See *Chambers v. Chambers*, 14 Am. Dec. 585; *Nelson's Heirs v. Clay's Heirs*, 23 Id. 387; *Porter v. Hooper*, 29 Id. 480; *Ruffner v. Lewis's Ex'rs*, 30 Id. 513; *Hancock v. Day*, 36 Id. 294, and notes thereto.

KEYSER'S APPEAL.

[13 PENNSYLVANIA STATE, 409.]

PROPERTY TAKEN IN EXECUTION MUST BE DISPOSED OF BY PUBLIC and not by private sale, which is, in such case, at least constructively fraudulent.

INDORSEMENT ON EXECUTION, "THIS LEVY AT RISK OF PLAINTIFF," means that the property may be left with the defendant until sale, at the risk of plaintiff, and not at the risk of the sheriff.

LEAVING PROPERTY LEVIED ON IN POSSESSION OF DEFENDANT, with the plaintiff's consent, does not *per se* divest the execution lien, in the absence of fraud.

PRIOR EXECUTION WILL BE POSTPONED TO SUBSEQUENT EXECUTIONS when the property levied upon, or a portion thereof, is sold under the prior execution at private sale, without the consent of the subsequent execution creditors, which cannot be inferred from the indorsement, "at plaintiff's risk," on such subsequent executions.

THIS is an appeal from a decree of the court of common pleas of Franklin county. Richards obtained a judgment against Garlin and a *fi. fa.* thereon. Subsequently, on the same day with the issuance of the first *fi. fa.*, a second execution was is-

sued in favor of Keyser against Garlin. And on the next day a third execution against the same defendant was issued to the Bank of Chambersburg. On the first two writs was indorsed, "Levy at the risk of the plaintiff;" and on the third, "The levy made by the sheriff on this writ is to be at the risk of the plaintiff, and of F. Smith and Jacob Heck, the indorsers on the note on which the judgment was obtained." Another execution was afterwards issued in favor of Franklin county, on which the property was sold; but this writ was subsequently set aside. The executions were all levied on the same property, which consisted of drugs, medicines, and the like. The decree of the court was that the money in the sheriff's hands be first applied to the execution of Richards, and secondly to that of Keyser. Keyser appealed on grounds appearing in the opinion of the court.

J. Nill, for Keyser.

F. Smith, for the bank.

W. Reilly, for Richards.

By Court, ROGERS, J. It seems to be conceded by the learned judge who ruled this case that the execution of Dr. J. C. Richards was postponed in favor of subsequent execution creditors. Indeed, it is difficult to come to a different conclusion. It appears in evidence that by an agreement between Richards and Garlin, the defendant in the execution, the result of a previous understanding, that the store on which his levy was made, was to be left open, and that the clerk of the defendant was to sell the goods in the same way as before the levy. Richards indorsed on the execution, "This levy at the risk of the plaintiff." In pursuance of this agreement, the store was left open, and the goods were sold at private sale, as before the levy, until the twenty-first of April, twelve days after the return day of the writ. The private sales during that time amounted to one hundred and seven dollars. Of this sixty dollars was paid directly to Richards, at the instance of the sheriff, and without passing through his hands. The clerk, by the agreement, was employed by Richards, and was to be paid by him.

Property taken in execution must be disposed of by public and not by private sale. To permit it to be sold otherwise would lead to fraud, and hence such an arrangement, although no actual fraud may be intended, is deemed fraudulent, and consequently postponed the execution creditor in favor of other executions, though subsequent in date. By this arrangement

there was a postponement of the sale until after the return day of the writ. The control and direction of the writ was wantonly taken out of the hands of the sheriff, but no notice whatever was given of the sale. In *Gibbs v. Neely*, 7 Watts, 805, it is ruled that even a sale after five days' public notice, with the assent of the debtor, is fraudulent as against his other execution creditors. But here the goods are sold at private sale, without any notice whatever, in which respect it is much stronger than *Gibbs v. Neely*. But *Bingham v. Young*, 10 Pa. St. 895, cannot be distinguished in principle from this case. In *Bingham v. Young*, it is ruled that where an execution creditor procures a special deputy to be appointed by the sheriff, and the goods levied on in a store are sold by him and the defendant at private sale, until other executions are left with the sheriff, the prior execution is postponed. In *Bingham v. Young*, as in this, the sheriff appointed a deputy, who, with the defendant, made private sales. There the public sale was before, here after, the return day of the writ; and the store was kept open for private sales some days, here eighteen days. In neither case had the sheriff any control or management of the sales. In all essential respects that case is identical with this.

Did the question rest here, the case would be attended with no difficulty whatever. This the court expressly admitted, but they are of opinion the first execution creditor is not postponed, because the subsequent execution creditors are *in pari delicto*, or, as Judge Watts terms it, in the same boat. If the premises be correct, I admit the conclusion is inevitable. Are they then *in pari delicto*? In the first place, we must throw out of view that each of the executions contains the same indorsement, viz., "This levy at the risk of the plaintiff." It must be remembered that Dr. Richards's execution is not fraudulent as against subsequent executions, because of that indorsement (for if it was, there would be no gainsaying the defendant's proposition), but because of the agreement between Dr. Richards and the defendant, Garlin. Such an indorsement is understood to mean nothing more than that the property, until sale, might be left with the defendant, at the risk of the plaintiff, and not at the risk of the sheriff; that if the property is not produced on the day of sale, so far as regards the plaintiff, the sheriff is released, and further, perhaps, as an agreement to indemnify the sheriff for a levy on the goods of a stranger: 1 Troubat & Haley, 483, in note. This course is frequently adopted when

the plaintiff has confidence in the defendant, or when, for other causes, he is willing or desirous the goods should not be removed.

But such an indorsement does not amount to a direct or implied stay of the proceedings, nor is it understood without more that the execution is put in the hands of the sheriff for security, and not for sale. Such an indorsement does not, nor does it purport to, interfere with the action of the sheriff in any other particular. Although it must be confessed there is appearance of contradiction in the *dicta* of some of the judges, yet it is the rule in this state, and in the neighboring state of New York, as is decided in *Eberle v. Mayer*, 1 Rawle, 369; *Howell v. Alkyn*, 2 Id. 283; *Doty v. Turner*, 8 Johns. 20; *Commonwealth v. Stremback*, 3 Rawle, 343 [24 Am. Dec. 351]; *Corlies v. Stanbridge*, 5 Id. 290—that merely leaving the property in possession of the defendant, though with the plaintiff's consent, is not *per se* fraudulent. The rule is, if goods be left in defendant's possession, even with plaintiff's permission, the lien is not lost, unless there be fraud. Casting aside, therefore, that which does not enter into its merits, is there any evidence that the subsequent execution creditors acceded to the arrangement made between Dr. Richards and the defendant, Garlin? Of this important fact we perceive no proof. There is nothing to evince that the subsequent execution creditors agreed that the store should be left open, and that the goods might be sold by the clerk at private sale. If there was, they were then *in pari delicto*, or, as the judge expresses it, in the same boat. No direction was given by them to the sheriff, except what appears on the back of the writ, the effect of which has been already considered. So far from proof of an assent to the agreement, on their part, there is proof from which plain inference may be drawn that they did not agree to it. The sheriff says he would most certainly have closed the store if it had not been for Dr. Richards. He would have had some advice before he would have closed on the two other executions. Neither of the other two gave him, as he says, orders not to close the store. They left him to exercise his own discretion about it. He would not have suffered the store to remain open, unless Keyser and the bank had agreed that the levies should be at their risk, as marked on the execution. There was then no agreement whatever between the two last execution creditors and the sheriff, such as is proved took place between him, the plaintiff and the defendant; or if there was, certainly no

proof of it was given. The sheriff was governed in his actions, as regards them, solely by the indorsement on the writ, as he testifies.

The defendant in error wishes us to infer a knowledge of, and consequent acquiescence in, the agreement. But the evidence on this point is too loose and unsatisfactory. It is true, they may have known of the first execution, that the store remained open from that time, the third of April, the day of levy, until the twenty-first, when the store was closed, and that in the intermediate time, the clerk was engaged in selling the goods. However this may be, there is no proof even of any knowledge of the secret agreement, even if that would affect them, which I by no means admit; much less is there any evidence from which we would be at liberty to infer they became parties to the arrangement.

Decree of the court reversed, and the money ordered to be paid to the bank and George H. Keyser, in order of time the executions came to the hands of the sheriff; the balance, if any, to be paid to Dr. Richards's execution.

PROPERTY LEVIED ON UNDER EXECUTION may be left in possession of defendant without divesting the lien: See *Weatherby v. Covington*, 49 Am. Dec. 623, and note citing prior cases; *Butler v. Maynard*, 27 Id. 100, and note.

EXECUTION OF PARTY PERMITTING GOODS levied upon thereunder to be sold at private sale is postponed to subsequent executions. The principal case is cited to this effect in *Parys & Co.'s Appeal*, 41 Pa. St. 277; *Pierce v. Evans*, 61 Id. 420; see also *Work's Appeal*, 92 Id. 261.

WALTER v. GERNANT.

[13 PENNSYLVANIA STATE, 515.]

LEAVING PROPERTY PURCHASED AT SHERIFF'S SALE IN POSSESSION OF FORMER OWNER for his use, or even for his consumption, is not fraudulent; but if the purchaser falsely declare that he is buying for the family, or to sell again at an advanced price for the benefit of the creditors, the property will remain with the debtor, subject to subsequent executions against the debtor.

PROPERTY BOUGHT IN AT SHERIFF'S SALE WITH DEBTOR'S MONEY is subject to subsequent executions against the debtor.

DECLARATIONS OF BY-STANDERS AT SHERIFF'S SALE ARE ADMISSIBLE as part of *res gestæ*, in a question of fraud, when they show that the purchaser's professions affected the bidding.

MOTION FOR NEW TRIAL IS REMEDY IN CASE OF WRONG VERDICT.

AN action of trespass was instituted by Walter against Gernant, an ex-sheriff, for damages suffered from the seizure and

sale of plaintiff's goods under an execution against George Guenther. Walter had purchased the goods at an execution sale of the property of said Guenther, on a judgment against him in favor a third party, and after his purchase had left them in the possession of Guenther, on another judgment and execution against whom the defendant sold them, after notice of Walter's claim. The defense was, that the sale to Walter was fraudulent; that he so conducted himself at the sale, by trick and subterfuge, as to prevent fair competition among the bidders for the property, and thus purchased it himself at an under-value. The character of the evidence introduced under this defense appears from the opinion below. The jury gave a verdict for the defendant; whereupon errors were assigned.

Dechert and Banks, for the plaintiff in error.

N. D. Strong, for the defendant in error.

By COURT. The law of the case seems to have been stated accurately and fairly. It is certainly not a fraud to leave property purchased at sheriff's sale in the possession of the former owner for his use, or even for his consumption. No presumption of fraud arises from retention of possession after a sale, which, being made under the supervision of the law, cannot be colorable; and permission to use or enjoy the thing bought is an act of benevolence, which does not amount to a gift of it, or revest it in the debtor. But if the purchaser falsely appeal to the benevolence or the cupidity of the bidders or creditors, by giving out that he is buying for the family, or to sell again at an advanced price for the benefit of the creditors, the property will remain with the debtor, subject to subsequent executions. Any false declaration of intention to gain a particular advantage would have that effect. So, if the property were bought in for the family with the debtor's money; and in all these principles the jury were properly instructed. But it is said there was no evidence to be submitted. The evidence was certainly scant; still there was enough to carry the case to the jury. The fact that the plaintiff converted part of the property to his own use, and the fact that he promised the bidders to sell the property again for their advantage, but did not, were circumstances of more or less weight. The declarations of the by-standers at the sale were proper to go to the jury, not only because they were part of the *res gestæ*, which showed that the plaintiff's professions had affected the bidding, but because the slightest circumstances are admissible in questions of fraud. The case was

properly put to the jury; and if the verdict was wrong, the plaintiff had no remedy but a motion for a new trial.

Judgment affirmed.

FALSE REPRESENTATIONS, BY WHICH COMPETITION AMONGST BIDDERS at execution sale is prevented, vitiate the sale: See *Stovall v. F. & M. Bank*, 47 Am. Dec. 85, and note referring to prior cases; *Foult v. McFarlane*, 37 Id. 467, and note. The principal case is cited to the effect that one purchasing property at a judicial sale, through trick or misrepresentation, must not expect to hold it through the help of the courts, in *Power v. Thorp*, 92 Pa. St. 351; and that the fraudulent intent of the buyer in such case is a question for the jury, in *Brotherline v. Squires*, 48 Id. 69.

NEW TRIAL, WHEN GRANTED BECAUSE VERDICT IS AGAINST EVIDENCE: See *Hall v. Page*, 48 Am. Dec. 235; *Clark v. Whittaker*, Id. 160; *Gerrish v. Nason*, 39 Id. 589, and note 592, collecting prior cases.

PURCHASER OF PERSONAL PROPERTY AT SHERIFF'S SALE may leave it with the defendant in execution, under any lawful contract of bailment. The principal case is cited on this point in *Smith v. Crisman*, 91 Pa. St. 430. See also cases in this series collected in the note to *Stovall v. F. & M. Bank*, 47 Am. Dec. 85.

DECLARATIONS OF BY-STANDERS AS PART OF RES GESTÆ.—In *Hogg v. Wilkins*, 1 Grant, 73, it is decided that the declarations of third parties to the effect that they would have bid more at a coroner's sale if the plaintiff had not declared that defendant could obtain the property from him if he bought it, upon payment of purchase-money and interest, are not admissible to impeach that sale. But the court declares that it does not in the least impugn the correctness of the principal case.

HAINES v. STAUFFER.

[18 PENNSYLVANIA STATE, 541.]

PROMISE BY BANKRUPT TO PAY DEBT DISCHARGED BY CERTIFICATE in bankruptcy is binding, though not made to the creditor or his authorized agent.

INSTRUCTIONS ON POINT ASSUMED BY COUNSEL should not be given, without some evidence from which it might be fairly inferred.

COURT OF COMMON PLEAS MAY MAKE RULES regulating a request for instructions on points; and where requested instructions have not been furnished to opposite counsel, according to rule, it is not error to refuse them.

CASE by Sarah Haines et al., executors of Haines, deceased, against Stauffer, on a promissory note dated September 12, 1843, and alleged to have been given by defendant to Haines, deceased. George Leaman was called by the plaintiffs at the trial, and testified that at about the time that defendant went into bankruptcy, but whether before or after witness could not remember, defendant declared, in a conversation with witness

as to what debts he would pay, that Haines had been a good customer of his and he would not let him stick. Defendant showed his discharge under the bankrupt act, on September 30, 1842; and acknowledged that before that discharge he had given Haines, deceased, the note in suit, but that the date had been altered so as to purport a time after his discharge. The remaining facts will be found stated in the opinion. Verdict for plaintiff and defendant brings error.

Long, for the plaintiff in error.

Stevens, contra, whom the court did not hear.

By Court, BURNSIDE, J. There was no error in the court admitting the evidence of George Leaman, who proved that the defendant declared that he would pay Major Haines, who had been his friend, and he would not let him stick. The time of this declaration, as well as the subject-matter of it, were for the jury, under the care and direction of the court. The evidence was admissible, in accordance with the ruling of this court in many cases.

In *Kingston v. Wharton*, 2 Serg. & R. 208 [7 Am. Dec. 638], it was held that where a debtor, previous to his bankruptcy, promises a particular creditor to pay the debt when he shall be able, his certificate of a discharge under the act of 1800 is no bar to an action on the new promise, although the original debt might have been proved under the commission; nor need the new promise be made to an agent of the creditor, to give a good cause of action: *McKinley v. O'Keson*, 5 Pa. St. 369.

The principle is further illustrated in *Comfort for Millikens v. Eisenbeis* [11 Pa. St. 13], decided in Harrisburg in May last, but not yet reported. It is there held that a promise by a bankrupt to pay a debt discharged by certificate is binding, though not made to the creditor, or his authorized agent. We think that the evidence was properly admitted.

The second error is to the charge of the court. Upon a careful examination of the evidence and the charge, we see no error. The jury were instructed that the defendant's signature to the note was proved in the usual way. The defense and allegation of the defendant was, that the note in suit, which bore date subsequent to the discharge and certificate under the bankrupt law, had been altered in its date, from a period prior to the discharge, for the purpose of avoiding the effect of the bankruptcy. The face of the note exhibited no evidence of the alteration to sustain this allegation. The defense rested

solely on the alleged declarations of Haines, as proved by Morton and Peck, that he held a note for six hundred dollars, dated prior to the proceedings and discharge in bankruptcy, and there was no way to recover it, unless he got a new note from Stauffer. The case of *Haines v. Stauffer*, 10 Pa. St. 363, is not inconsistent with the ruling of this case. There the court submitted as a fact to the jury the ingenious suggestion of the defendant's counsel, of which there was no evidence. The determination of this court was, that where a state of facts could not be inferred on a demurrer to evidence, it was error to submit their determination to a jury. I think the case was fairly put to the jury, under the evidence, and in accordance with the principles settled by the supreme court; and the jury were instructed, if they found the note in suit given by the defendant as it purported, the plaintiff was entitled to a verdict. If it was not given as it purported, or its date altered, the plaintiff ought not to recover. A court has no right to submit a point assumed by counsel without some evidence from which it might be fairly inferred.

The learned counsel had requested the court to instruct the jury on some ten points—which the court refused to notice, because they were not furnished for the opposite counsel, agreeably to the rule of the common pleas, and because the instructions in the general charge were all the case required.

The common pleas has a right to make rules regulating a request for instructions on points. Many cases have been reversed, in this court, on points put and answered by the court, near to or at the close of a charge, artfully put by ingenious and able counsel, which had not been considered by counsel on the trial, or carefully considered by the judge. This is a practice of professional skill with which I have been long familiar. The courts owe it to themselves, as well as to suitors, to make such rules as will prevent surprise, and enable them to answer upon reflection, and without a waste of the public time. Here the rule of court had not been complied with, and the defendant's counsel were not entitled to an answer.

The judgment is affirmed.

PROMISE BY BANKRUPT TO PAY DISCHARGED DEBT, SUFFICIENCY OF: See *Yoxheimer v. Keyser*, 51 Am. Dec. 555; *Merriam v. Bayley*, 48 Id. 591, citing prior cases.

INSTRUCTIONS ASSUMING FACTS WHICH CANNOT BE FAIRLY INFERRED FROM EVIDENCE should be refused: See *Melledge v. Boston Iron Co.*, 51 Am. Dec. 59, and note 74, referring to prior cases. To instruct jury on matters not

in evidence is error: *State v. Hildreth*, Id. 369. Refusal to give abstract instructions is not error: *Stevenson's Heirs v. McReary*, Id. 102. But in *Melledge v. Boston Iron Co.*, *supra*, it is held that an instruction assuming an hypothetical case, of which there is no evidence, is regarded as a mere illustration of a rule of law which cannot mislead the jury.

YUNDT'S APPEAL.

[18 PENNSYLVANIA STATE, 575.]

ADVANCEMENT IS PURE AND IRREVOCABLE GIFT MADE BY PARENT TO CHILD in anticipation of such child's future share of the parent's estate, and not involving the idea of future liability to answer.

DECLARATIONS OF DECEDENT'S DAUGHTER RESPECTING DEBTS due decedent from her husband cannot change such debts into advancements.

DECLARATION OF PARENT OF INTENTION TO TREAT EXISTING DEBT due from child or husband thereof as an advancement will not produce this effect when not agreed to by the child, nor accompanied by an act obliterating the obligation as a debt.

NO WORD OR PHRASE IN TESTAMENT CAN BE DIVERTED from its appropriate subject by extrinsic evidence showing that testator commonly, or on that particular occasion, used the disputed word in a sense peculiar to himself, or even in a popular sense, as distinguished from its strict and primary import.

HEIR IS ENTITLED TO INTEREST ON HIS SHARE from time when distribution was made to the other legatees, and ought to have been made to him.

INTEREST IS NOT GENERALLY CHARGEABLE ON ADVANCEMENTS; but when by the method used in calculating an heir's share the auditors have obtained the same result as if interest had not been charged on advancements, their report will be sustained.

INTEREST ON SUMS ASCERTAINED TO BE IN EXECUTOR'S HANDS will not be suspended pending the examination of their account.

APPEAL by the executors of the will of John Yundt from a decree of the orphans' court of Lancaster county. The executors filed their account on the thirteenth of November, 1834, showing a certain balance, which was distributed among Yundt's children, with the exception of the appellees. A second account was filed in 1844, showing a much larger balance in their hands. In June, 1847, the appellees, children of Mary, or Polly, Horst, who was Yundt's daughter, petitioned the orphans' court for a citation, calling upon the executors to show cause why they should not pay the petitioners their share of decedent's estate. The citation was awarded and auditors appointed, who reported on March 14, 1849, that they found in the hands of the executors, in 1844, thirty-seven thousand three hundred and sixty dollars and forty-nine cents, of which one ninth, or Mary Horst's share, they found to be seven thou-

sand dollars and forty-six cents, from which deducting an advancement of four hundred and forty dollars and sixty cents, with interest thereon to the amount of three hundred and seventy-seven dollars, or in all eight hundred and seventeen dollars and sixty cents, they found Mary Horst's children to be entitled to six thousand one hundred and eighty-three dollars and eighty-six cents. Exceptions to this report were filed on the part of the executors, and to a decree of the court confirming the report this is an appeal. The questions involved are fully stated in the opinion of the court.

Frazer, for the appellants.

Stevens, *contra*.

By Court, BELL, J. John Yundt, by his last will, dated March 23, 1829, directed the remainder of his estate to be apparently increased by the addition of all the advancements theretofore made by him to his children, and the aggregate thus ascertained to be divided into ten equal shares, to be distributed among certain of his children named, after deducting from the share of each child the sum advanced to him or her by the testator. Among these children is named his daughter Polly, then intermarried with Joseph Horst, who was largely indebted to the father. The latter, sedulous, as it would seem, to preserve for the use of his daughter such share of his estate as might be found coming to her, under the provision I have alluded to, created a trust for the preservation of the fund during the coverture of the daughter, with a direction to pay over to her the fund, absolutely, should the coverture be determined by the death of the husband; but should he survive his wife, then to distribute it among her children in equal shares.

That by this a benefit was intended for the wife, independently of her husband, is too obvious for doubt or hesitancy. It was not subject to be defeated by his improvidence, nor absorbed by debts he might contract. But its extent was to be ascertained by charging against her the values she had before received at the hands of her father, by way of advancement, or in the words of the testament, "all advancements shall be respectively deducted from each respective share" before distribution made. It is shown that all the daughters, on their intermarriage, were advanced by the father in household furniture and other necessary articles, and some of them, as well as the sons, received assistance in cash.

The articles thus furnished to Polly amounted to four hundred and forty dollars and sixty cents, of which a memorandum was made by the father, in a book containing also an account of the advancements made to the other children from time to time. These entries wear no appearance of book-accounts, intended to constitute the evidence of debts contracted by the children, but are, beyond question, simple memoranda, made to assist in carrying out the then entertained and afterwards expressed intention of the parent, to distribute his property equally amongst his sons and daughters. In this light they have been viewed by all the parties in interest; were so introduced by the executors into the inventory of the testator's effects, and are now accepted all round, as indicating undisputed amounts to be treated as advancements within the meaning of the will. Of these, therefore, no question is made.

But Horst, the husband of Polly, was, long before the making of the will, indebted to his father-in-law for money loaned, money paid for him, and rents due from him. For the payment of these debts, bonds, notes, or other securities were taken, amounting in the whole to seven thousand seven hundred and thirty-seven dollars and sixty-eight cents. In addition to this, on the twentieth of April, 1826, on an account stated of further claims held by the testator against Horst, the latter was found indebted to the former two thousand eight hundred and seventy-three dollars, a statement of which fact, on the request of the parties, was entered in a book other than the book of advancements, Mrs. Horst at the time remarking, "This we owe to father honestly." Can this indebtedness of her husband be used for the purpose of absorbing Mrs. Horst's interest under the will of her father, and thus defeating the claim now made by her children, the appellees? It is conceded it cannot be so used, unless it can be considered in the nature of an advancement made to the husband and wife; for by the directions of the will, advancements alone are to be deducted from the residuary legacies. But advancement, in its legal acceptation, does not involve the idea of obligation, or future liability to answer. It is a pure and irrevocable gift made by a parent to a child in anticipation of such child's future share of the parent's estate. Regarded only in their inception, this cannot, with any show of reason, be asserted of the husband's liabilities. They exhibited no single quality of gift. Obligation to pay was an idea inseparable from them, subjecting the husband to coercive process, under the pressure

of which he would in vain have suggested that his father-in-law intended only the advancement of his daughter, unconnected with the thought of reclamation. Nor was the character of debt which attached upon the settlement of 1826 at all modified or affected by the remark of Mrs. Horst I have cited. If it was an obligation resting on the husband at the moment of its ascertainment, nothing his wife could say would have the effect to make her a joint debtor: *Dorrance v. Scott*, 8 Whart. 309 [31 Am. Dec. 509]; and if it had, it would not help the appellant's case, for the sum ascertained would still retain all the characteristics of a debt. This brings us to the inquiry, whether the evidence offered of the declarations of the testator, tending to show an intention to treat the debts due from his children and their husbands as advancements, ought to have been received. Were this a case of intestacy, the question put must have been met by a flat negative under the authority of our own cases.

Nothing seems to be better settled than that the *ex parte* declarations of a parent of an intention to treat an existing debt as an advancement, not communicated nor agreed to by the child, nor accompanied by an act sufficient to obliterate the obligation as a debt, cannot change it into gift by way of advancement, whether the evidence be offered by the child to defeat the recovery of the debt, or by the representatives of the parent to bar the child's claim to a distributive share of the parent's estate: *Haverstock v. Sarbach*, 1 Watts & S. 390; *Levering v. Rittenhouse*, 4 Whart. 137; much less can such evidence be introduced for the purpose of saddling a daughter with the debts of her husband, as advancements made in anticipation of her future interest in the parent's property. This rule does not, however, exclude written entries made by the parent of advancements, as is shown by *Hengst's Estate*, 6 Watts, 86, nor declarations contemporaneous with the transaction, declaratory of its nature. But a further difficulty lies in the way of the appellants. Their effort is either to explain the terms of a testamentary writing by parol, or to defeat a legacy by oral declarations inconsistent with it.

Now, though it is true that where the language of a will has no apparent object upon which to operate, evidence *aliunde* may be used to introduce one, the general rule is, that no word or phrase in a testament can be diverted from its appropriate subject by extrinsic evidence, showing that the testator commonly, or on that particular occasion, used the disputed word in a sense peculiar to himself, or even in a popular sense,

as distinguished from its strict and primary import: 1 Jarm. on Wills, 358. In the instance before us, the word "advancement," as used in this will, has its appropriate object, as we have seen, and consequently there can be no apology for disregarding the general rule excluding oral proof. That the legacy given to Mrs. Horst and her children cannot be thus defeated is abundantly established by *Kreider v. Boyer*, 10 Watts, 54, a case which, while it fully recognizes the doctrine that a prior legacy may be adeemed by a subsequent advancement, and even that such an intention may be shown by the testator's declarations, utterly denies that such declarations are competent to convert a loan made by the testator to his son-in-law into an advancement of the daughter, in order to defeat a legacy given to the latter by the will of her father, executed after the creation of the debt. That Joseph Horst's liabilities to the testator were considered as debts, by every one having an interest in the subject, up to and after the testator's death, is apparent from everything legitimately disclosed by the evidence, a view which seems to have been changed only by the discovery that the debts were not applicable as a set-off in answer to a demand of the wife's legacy. It would seem indeed that Mrs. Horst herself, as well as her husband, labored under the misapprehension that such an application might be made of them, but it is almost needless to observe that this mistake will not confer upon them a quality which, without it, they do not possess. The question involved here has been so frequently discussed by this court, and particularly in *Kreider v. Boyer*, *supra*, that I deem it unnecessary to elaborate the argument. It will suffice to observe, in conclusion, that the orphans' court was right in excluding the husband's debt from consideration when ascertaining the rights of the wife's children.

The second error assigned is sufficiently answered in the argument submitted for the appellees. It is true that interest is not generally chargeable on advancements. But the mode of calculation pursued by the auditors, and sanctioned by the orphans' court, produces the same result as though the advancements had been introduced without interest in the year 1834, when distribution ought to have been made and the share of Mrs. Horst ascertained, and interest calculated upon that share up to March, 1849. No injustice is, therefore, inflicted on the appellants by the course adopted. There is no pretense for suspending the interest on the sums ascertained to be in the executor's hands, pending the examination of their account

of 1844. They were bound to keep the fund at interest, unless peculiar circumstances intervened to excuse it, which it was incumbent on them to show.

We think it sufficiently apparent, looking to all parts of the will, that the testator intended the children of Mrs. Horst should receive, on the death of their mother, all that was payable to her during the coverture, but which from any circumstance she failed to receive. It is plain a leading object was to exclude the husband from any participation, except so far as he might attain to the enjoyment of the annual interest through his wife. But the direction is express to pay to her children their mother's share after her death, and this, we think, may be well taken to include the interest accruing during her life, and which was not reduced to possession. At all events, the husband puts in no claim to it, and he is the only person who by possibility can dispute the children's right. He cannot be compelled to do this for the benefit of the other legatees, which would be the sole effect of an adoption of the view urged by the appellants.

The claim of the husband, if he has any, being out of the way, there is nothing to narrow the claim of the children, as between them and the executors.

Judgment affirmed.

EXTRINSIC EVIDENCE, WHEN ADMISSIBLE TO EXPLAIN WILL: See *Barnes v. Stimms*, 49 Am. Dec. 435, collecting prior cases in the note; see also *Hileman v. Bouslaugh*, ante, p. 474. In *Brownfield v. Brownfield*, 51 Id. 590, it is held that to remove a latent ambiguity in a will, declarations of the testator as to the relative amount of advancements to different devisees are admissible. See also *Asay v. Hoover*, 45 Id. 713. The principal case is cited in *Miller's Appeal*, 40 Pa. St. 62, and in *Oller v. Bonebrake*, 65 Id. 344, as authority to the effect that the declarations of a parent of an intention to treat a debt as an advancement, not communicated or agreed to by the child, and unaccompanied by any act operating to obliterate the obligation as a debt, are inadmissible to produce that effect. See also *Batton v. Allen*, 43 Am. Dec. 630. An extensive note on the construction of "and" for "or," and *vice versa*, will be found appended to *Janney v. Sprigg*, 48 Id. 565.

INTEREST, WHEN RECOVERABLE AGAINST EXECUTORS AND ADMINISTRATORS: See *Weir v. Weir's Adm'r*, 39 Am. Dec. 487, and cases cited in note thereto; and *Patterson v. Nichol*, 31 Id. 473. The principal case is cited to the effect that it is the plain and obvious duty of a trustee under a will to invest the fund so as to make it productive: *Breneman v. Frank*, 28 Pa. St. 479; *Bruner's Appeal*, 57 Id. 52. In *Estate of Samuel C. Ford, Deceased*, 11 Phila. 97, it is held that interest should begin to run from the time when distribution ought reasonably to be made, that is, at the expiration of a year, or within a reasonable time thereafter, citing the principal case.

ADVANCEMENTS, WHAT ARE.—The principal case is cited as defining advancements in *Miller's Appeal*, 31 Pa. St. 338; see *Hatch v. Straight*, 8 Am. Dec. 152; *Wanmaker v. Van Buskirk*, 23 Id. 748; *Waller v. Todd*, 28 Id. 94.

PROOF OF MERE PAROL DECLARATIONS of a father that he had fully advanced a child is not sufficient to establish an advancement: *Batton v. Allen*, 43 Am. Dec. 630. A paper purporting to be a schedule of advancements forms no part of a will, and has no effect on admitting it to probate: *Grabill v. Barr*, 47 Id. 418.

HAEHNLEN v. COMMONWEALTH.

[13 PENNSYLVANIA STATE, 617.]

RIGHT OF COMMONWEALTH CANNOT BE LOST BY LACHES OF ITS AGENTS.

DEBT by the commonwealth against C. F. Haehnlen and others, who were sureties on the official bond of Jacob Sallade, ex-surveyor-general of Pennsylvania, brought to recover certain fees received by said Sallade in his official capacity, and not paid to the state treasurer. The sureties defended on the ground that the commonwealth had the means of satisfying its claim in its hands, which, by the negligence of its agents, had passed into the hands of Sallade; and invoked the principle that a creditor having the means of satisfaction in his hands, by suffering them to pass into the possession of the principal, releases the sureties. Evidence was offered to show that out of the fees claimed, Sallade had on divers occasions paid certain running expenses of his office; that his accounts for these running expenses had been subsequently settled by the auditor-general, who drew warrants for the amount thereof on the state treasurer, who paid them. Whereas, as it was alleged in the defendant's plea, the auditor-general and state treasurer should have retained the amounts of the warrants for expenses, and credited them as against the fees then due from Sallade. Defendants further offered to show that it had been the long-continued practice for the surveyor-general to pay contingent expenses out of the fees received, and to receive credit for such expenditure in his quarterly settlement for fees, and that the amount of said contingent expenses was drawn quarterly from the treasury and paid to Sallade by the accountant department; whereas the amount due the commonwealth from the surveyor-general should have been deducted from the amount so paid over. And further, that after the chief clerk of the accountant department received the fees and paid out the amount of aforesaid expenses, Sallade received the same amount for the same expenses from the state treasurer, as aforesaid. They desired to show further that the salary of Sallade, as surveyor-general, was paid to him quarterly,

whereas it should have been held back in order to meet the amount of fees in his hands, and due the commonwealth. This evidence was all rejected, and on the exceptions taken the case comes up on error.

McCormick, for the plaintiff in error.

R. McAllister and F. C. Carson, contra.

By COURT. *United States v. Kirkpatrick*, 9 Wheat. 720, is the leading authority for a principle which covers the case. While that authority remains unshaken, to show that it was the duty of the accounting officers to prevent the defalcation is to show nothing. That case, and many others in our own books, prove beyond question that the right of the commonwealth cannot be lost by the laches of its agents. The present offers nothing new, nor any circumstance to take it out of the rule of policy we have invariably enforced.

Judgment affirmed.

MUNICIPAL CORPORATION, RIGHT OF, NOT LOST BY LACHES OF ITS OFFICERS.—The principal case is cited as authority on this point in *Porter v. Commonwealth*, 17 Pa. St. 18; *Commonwealth v. Porter*, 21 Id. 389; *Commonwealth v. Brice*, 22 Id. 214; *County of Schuylkill v. Commonwealth*, 36 Id. 536. But a municipal corporation is liable for injury resulting from the negligence or unskillfulness of its agents: See *Commissioners of Kensington v. Wood*, 49 Am. Dec. 582; *Ross v. City of Madison*, 48 Id. 361, and cases cited in notes thereto.

FISHER v. KNOX.

[13 PENNSYLVANIA STATE, 622.]

ASSIGNEE OF MOIETY OF JUDGMENT, who does not mark notice of his interest therein upon the record, is postponed to a subsequent assignee.

ATTORNEY FOR PLAINTIFF IN EXECUTION, PURCHASING PROPERTY sold under the execution, contrary to plaintiff's orders, is responsible for the amount of the judgment under which the property was sold.

ATTORNEY IS NOT ENTITLED TO COMPENSATION when he does not offer to his client all the money he is bound to pay him within a reasonable time.

MAXIM, QUI PRIOR EST IN TEMPORE PORTIOR EST IN JURE, will not protect one who has neglected requisite caution to protect from imposition those who come after him, for entirely consistent and equally potent is the maxim, that one must so enjoy his property as to do no injury to another which can be prevented.

NEGLIGENCE IN ENJOYMENT OF PROPERTY, or the exercise of a right, is cause of redress in equity and at law, unless there has been supineness on the other side.

CASE for money had and received by Knox, the defendant, as attorney of the plaintiff. A judgment was entered April 25, 1842, in favor of Small against one Corzatt, who had executed a

bond to Small, with authority to confess judgment in default of payment. Small being in possession of the bond, on the fourth of May, 1843, assigned all his interest in "the within judgment bond, and all moneys due and to become due to him on the same," to Fisher, the plaintiff herein. Prior to this assignment, to wit, in May, 1842, an assignment of "one equal moiety or half part" of said judgment had been made to Edward J. Smith. But at the time of the assignment to the plaintiff Fisher, no notice had been entered on the record of the judgment, or on the bond itself, that any other party than said Small had any interest in the judgment. Before assigning the claim to Fisher, Small had placed the judgment in the hands of Knox, the defendant, for collection. After Fisher received his assignment, he notified Knox of that fact, and desired him to have execution issued. Knox replied, suggesting that the bond be sent up and filed for record, and the judgment marked for Fisher's use. A *fi. fa.* was then issued. In the various correspondence which passed between Fisher and Knox, and which was in evidence, Knox informed Fisher of the prior assignment of one half of the judgment, and expressed his opinion that the property would not sell for cash at any reasonable price, and would probably have to be bid in for the plaintiff. Fisher replied that if the property would not sell for the amount of his judgment, or near it, he desired Knox to allow the sheriff to return it unsold for want of bidders, and under no circumstances to have it knocked down to him under his judgment; and that he did not recognize that any other person had any interest in his said judgment. The property was sold under an *alias vend.* thereafter, in December, 1844, and defendant Knox bid it in for an amount considerably less than the amount of the judgment. And Knox, in a letter to Fisher, dated in November, 1847, some three years afterwards, justifying himself on the ground that he had pursued the most advisable course under the circumstances, informed the plaintiff that he had disposed of the property to a purchaser for a sum, payable in four equal annual installments, which would nearly pay the amount of the bond, interest, and costs; and in conclusion said: "I am willing to pay the one half to you, and will send it in any way which you may direct; but as to the other half, I cannot pay it to you without having the decision of the court upon the matter." The court below instructed the jury, among other things, that, as the defendant had disobeyed the instructions of the plaintiff, and bought in the property at the execution sale, he, the court, was of the

opinion that the defendant was responsible for all that was lawfully due the plaintiff, to wit, one half of the original judgment and interest; that is, all not previously assigned. The court further instructed the jury that they must judge whether the business had been promptly attended to by the defendant, and all the money which he was bound to pay offered in a reasonable time. If it was, defendant was entitled to a fair compensation for his trouble; if not, he could recover nothing. Plaintiff excepted to the charge, and the verdict being in accordance with the expressed opinion of the court, brought error.

Fleming and R. J. Fisher, for the plaintiff in error.

McCormick, for the defendant in error.

By Court, GIBSON, C. J. As the defendant is but a stakeholder as to a moiety of the judgment in contest, the question is, whether the prior assignee of that moiety has forfeited his title to it; and it is very clear that he has. The maxim, *Prior in tempore portior in jure*, holds, it is true, wherever it has not been inverted by enactment, as it has been by the recording laws so far as regards conveyances of land, or where the benefit of it has not been lost by misconduct or imprudence; but it must not be allowed to protect a party who has neglected a requisite precaution to protect from imposition those who may come after him. That a man is bound to enjoy his property so as to do no injury to another which can be prevented, is also a maxim entirely consistent with the preceding one, and equally potent. It contains the ruling principle of an extensive range of cases, and among others, cases of injury from negligence. Thus, in *Parnaby v. Lancaster Canal Co.*, 11 Ad. & El. 223, Lord Denman held the defendant liable for damage suffered from a boat which had been sunk in the channel of the canal and was not removed, comparing the case to that of a shop-keeper who leaves a trap-door open by which a customer receives a hurt, and the judgment was affirmed in the exchequer chamber. On the same principle, it was ruled in *Vaughan v. Menlove*, 3 Bing. N. C. 468, that an action lies against a proprietor for having placed a rick so near the extremity of his land that the flames, from a spontaneous combustion of the hay, set fire to his neighbor's house. The English books are full of decisions for the principle, and they contain only one which infringes on it.

In *Harris v. Baker*, 4 Mau. & Sel. 27, trustees of a road were not held liable to an action for a personal injury received from

a fall in the night, over a heap of scrapings on the roadside, placed there without a light to give notice of it, because, as Lord Denman explained the case in *Parnaby v. Lancaster Canal Co.*, the defendants were public offices who derived no benefit from the road. But were they for that reason less answerable for neglect of official duty? According to *Coggs v. Bernard*, 2 l.d. Raym. 909, a volunteer without hire is held to reasonable diligence. The truth seems to be, Lord Denman saw that *Harris v. Baker* was not sustainable, and it would have been more candid in him to overrule it. Whatever may be thought of that case in England, it is very certain that *Mott v. Clark*, 9 Pa. St. 399 [49 Am. Dec. 566], coming up as it does to the very point, settles it here. A grantee who had not registered his conveyance was postponed to a party who had taken without notice an assignment from a subsequent mortgagee who had notice, though the grantee was not bound by the recording acts to register his deed for the information of those who might be disposed to purchase a subsequent mortgage. He was held bound to do so by the maxim last quoted.

The rule therefore is, that unless there has been supineness on the other side, negligence in the enjoyment of property or the exercise of a right is cause of redress in equity and at law. Was there not on the part of the prior assignee in these instances culpable indifference to the interest of others? Though no law requires such an assignment to be docketed, the practice to mark the judgment to the use of the assignee is universal, and it ought to have been pursued here; for no prudent purchaser of a judgment invests his money in it before the record has been inspected. From what else could he derive information? He has nothing for it but the honor of the assignor; and any one who leaves it in the power of another to deceive may be said to collude with him beforehand. Certainly a chancellor would not execute an equitable assignment in his favor.

As the defendant's character of stakeholder of a part is put out of the way, he is liable for the whole on the principle laid down by the judge to charge him with a moiety.

Judgment reversed, and *venire de novo* awarded.

NEGLIGENCE IN ENJOYMENT OF PROPERTY, unless there has been supineness on the other side, is cause for redress both at law and in equity. The principal case is cited as sustaining this principle in *P. F. W. & C. R. R. Co. v. Gilleland*, 56 Pa. St. 451. For cases on contributory negligence as a bar to recovery, see *Birge v. Gardner*, 50 Am. Dec. 261, and cases cited in note thereto; and *Tonawanda R. R. Co. v. Munger*, 49 Id. 239; *Parker v. Adams* 46 Id. 694.

MAXIM, "PRIORITY IN TIME AMONG MERE EQUITIES GIVES PRIORITY OF RIGHT," is recognized in *Skipwith v. Cunningham*, 31 Am. Dec. 642; *Polk v. Gallant*, 34 Id. 410; *Muir v. Schenck*, 38 Id. 633; *Ingram v. Morgan*, 40 Id. 626. The principal case is cited to the effect that the maxim, that "a man is bound to enjoy his property so as to do no injury which can be prevented," is entirely consistent and equally potent with the above maxim, in *Rider v. Johnson*, 20 Pa. St. 192.

ASSIGNEE MUST GIVE RECORD NOTICE OF ASSIGNMENT OF JUDGMENT, or he will be postponed to a subsequent *bona fide* assignee without notice. The principal case is cited as sustaining this rule in *Phillips v. Bank of Lewistown*, 18 Pa. St. 402; *Guthrie v. Bashline*, 25 Id. 80; *Campbell's Appeal*, 29 Id. 403; *Horstman v. Gerker*, 49 Id. 288; *Rowland v. State*, 58 Id. 198; *Fraley's Appeal*, 76 Id. 43; *Buffington v. Bernard*, 90 Id. 68. In *Horton v. Miller*, 44 Id. 258, it is cited to the effect that the purchaser of a judgment is bound to take notice where the record shows a previous assignment thereof. And in *Wetherill's Appeal*, 3 Grant, 288, it is cited on the general proposition that a third person will lose his right in a chose in action by laches which causes injury to a purchaser thereof. In *Mohler's Appeal*, 47 Am. Dec. 413, note, the cases in this series upon the assignments of judgments are collected. In *Brown v. McGehee*, 31 Id. 695, it is held that an assignment of a judgment made on a sheriff's memorandum book is no notice thereof to third persons.

ATTORNEY, LIABILITY OF, FOR NEGLIGENCE: See *Krauss v. Dorrance*, 51 Am. Dec. 496, and note, where it is held that an attorney at law, in the absence of fraud or negligence, is not liable for failure to turn over money collected to his client until demanded to do so. See also *Cox v. Sullivan*, 50 Id. 386, and note, citing other cases. In *Averill v. Williams & Sage*, 47 Id. 252, it is held that an attorney has no authority to direct what shall be sold under his client's execution, nor to bid for him at such execution.

ATTORNEYS, COMPENSATION OF: See note on attorney's lien for compensation: *Andrews v. Morse*, 31 Am. Dec. 755.

BECK v. UHRICH.

[18 PENNSYLVANIA STATE, 636.]

DOCUMENT FORMING PART OF RES GESTÆ and conducing to illustrate the case is admissible in evidence.

ONE BUYING LAND WITH MONEY OF ANOTHER, and taking legal title in his own name, becomes trustee of a resulting trust in favor of the latter, even though he stood in no fiduciary character to the person whose money has been used.

PURCHASER FROM TRUSTEE WHO SELLS IN HIS OWN RIGHT need not pay purchase-money, though he has accepted a deed and given his bonds; as to unpaid purchase-money, he is a volunteer.

INNOCENT PURCHASER OF TRUST ESTATE WITHOUT NOTICE OF TRUST is protected as far as he has paid his money.

EQUITY NOT ONLY CONSIDERS THAT DONE WHICH OUGHT TO HAVE BEEN DONE, but it also, in many instances, considers that undone which never ought to have been done.

ISSUES were directed on two judgments entered on two judgment bonds given by Peter Beck to Joseph Uhrich, for the

balance of the purchase-money due on land sold by Uhrich to Beck. The judgments were for one thousand five hundred and fifty dollars, being the amount of the purchase-money, less two hundred dollars paid by Beck. Beck made an application to the court to open the judgments on the ground of failure of consideration, alleging that the heirs of John Uhrich, of whom the said Joseph Uhrich was the son and one of the administrators, claimed a part of the land. On the trial of the issues, the court instructed the jury that the heirs could not resort to the land, but must look to Joseph Uhrich as administrator, and the fund in his hands derived from the sale of said real estate. Defendant Beck excepted. The remaining facts are sufficiently stated in the opinion.

Carson and Rawn, for the plaintiff in error.

Boas and McCormick, for the defendant in error.

By Court, COULTER, J. The error assigned as to the reception of testimony is of no account. The evidence received was a document which composed part of the *res gestæ*, conduced to illustrate the case, and is opposed by no canon of the law. Evidence is for the purpose of shedding light on the transaction, but sometimes the objections to evidence would raise a strong implication that the design was to produce dim twilight. The whole case turns upon this category: Was Uhrich in fact and in law a trustee of the land sold to Beck? Or was he the owner in his own right? It is true that Beck paid two hundred and fifty dollars to Uhrich, who was the apparent legal owner; and if he purchased without notice of the trust, he would have an interest in the land to that extent, for which he is, perhaps, more than compensated long ago by the rents, issues, and profits. But Beck himself makes defense to the payment of the bonds upon the ground that plaintiff cannot make good title, and he cannot be permitted to blow hot and cold. Uhrich was but a trustee. The equitable title resides in the heirs of John Uhrich, deceased.

If one man buys land with the money of another man, even though he stand in no fiduciary character to the person whose money has been used, and takes the legal title in his own name, there is a resulting trust, and the legal title is a mere naked form, and only evidence of title in favor of the *cestui que trust*, because his money paid for it. In this case, Joseph Uhrich, the plaintiff, was one of the administrators of John Uhrich, deceased, bound by principles of law to take care of the funds of the estate, and husband them for the creditors in

the first place, and afterwards for the heirs. Crum, the other administrator, and Joseph Uhrich, appear to have acted in concert and harmony, and the result was that, contrary to the fidelity which they owed to the heirs, they caused the land to be sold, purchased themselves, paid for it with the funds of the estate, never advanced a dollar of their own, took the title in the name of Joseph Uhrich, who now claims its product in his own right.

It is possible that when the sale was made Joseph intended to be honest, and he has an opportunity of being so yet by sitting down *loco penitentia*. There is a stronger reason for a resulting trust here than in the common case where one buys land with another man's money. We are of opinion that a resulting trust existed in Joseph Uhrich, the holder of the legal title, in favor of the heirs of John Uhrich, the *cestui que trust*, and that therefore Beck has a defense to the bonds which he gave Joseph Uhrich for the purchase-money. Beck is to be considered as a volunteer, so far as he has not paid the purchase-money, even in relation to the heirs of John Uhrich, and he may protect himself although he has accepted a deed and given his bonds. Equity not only considers that done which ought to have been done, but it also, in many instances, considers that undone which never ought to have been done.

It is necessary that it should be so for the protection of the innocent from the artifice of the guileful or covinous. The real truth and good conscience of a cause has more power in courts now than it used to have against bonds and judgments.

So far as an innocent purchaser is concerned, there he is protected as far as he has paid his money.

Judgment reversed, and *venire de novo* awarded.

RESULTING TRUST ARISES IN FAVOR OF PARTY PAYING PURCHASE-MONEY for land, where the deed is taken in the name of another: See extensive note on this subject, *Neill v. Keese*, 51 Am. Dec. 753; *Baker v. Vining*, 50 Id. 617, citing prior cases.

PURCHASER OF TRUST PROPERTY BOUND BY TRUST when he has notice thereof: *Talbot's Ex'rs v. Bell's Heirs*, 43 Am. Dec. 126; and *Dunting v. Ricks*, 32 Id. 699, and cases cited in notes thereto.

DUTY OF INNOCENT PURCHASER FROM TRUSTEE, IN VIOLATION OF TRUST, is to withhold the payment of the purchase-money from the time of the discovery of the fraud; and the defect in the vendor's title, in such case, is a good defense in a suit by the vendor for the purchase-money. The principal case is cited to this effect in *Dunn v. Leidy*, 3 Phila. 359.

TRUSTEE CANNOT ACQUIRE INTERESTS IN CONFLICT to those of his *cestui que trust*. The principal case is cited to this effect in *Fisher's Appeal*, 34 Pa. St. 31.

DOCUMENT FORMING PART OF RES GESTÆ admissible in evidence: See *Richardson v. St. Joseph Iron Co.*, 83 Am. Dec. 460, where an irrelevant writing, unconnected with the issues, but which was referred to in the proved admissions of the adverse party, was admitted. Also upon the general principle of admitting *res gestas*: See *Pa. etc. Nav. Co. v. Dandridge*, 29 Id. 543.

EQUITY CONSIDERS THAT DONE WHICH OUGHT TO HAVE BEEN DONE: See *Harris v. Alcock*, 32 Am. Dec. 158.

BISBING v. GRAHAM.

[14 PENNSYLVANIA STATE, 14.]

ASSIGNMENT OF PROMISSORY NOTE WITHOUT RECOURSE does not put the transferee upon inquiry as to the equities between the original parties thereto.

ONE WHO INDORSES NOTE WITHOUT RECOURSE IS COMPETENT WITNESS for a subsequent holder in an action to enforce payment of the note.

WHERE NOTE IS LOST AFTER SUIT IS BROUGHT TO RECOVER ON IT, judgment may be rendered without giving indemnity, but the court should restrain the plaintiff from taking out execution thereon until he has furnished indemnity.

ACTION by Graham, as indorsee of Paynter, against Bisbing, the drawer of a promissory note. The indorsement on the note was in these words: "For value received, I assign to William Graham, or order, all my right, title, and interest in the within note, without recourse. David Paynter." There was a dispute between Bisbing and Paynter about a vessel which was jointly owned by them; and a settlement having been made, Bisbing gave a note for the balance ascertained, with an express agreement in writing that if any other claims than those enumerated in the agreement should be brought against the vessel, they were to be paid by Bisbing and deducted from the amount of the note. Bisbing averred that claims to the amount of one hundred and seventy-six dollars were presented against the vessel, and that he had paid the greater part of these claims and was responsible for the rest. He further averred that the note was fraudulently indorsed over to Graham, who was the son-in-law of Paynter, in order to prevent the set-off. Sarah Paynter, the wife of David Paynter, deposed that she was the owner of one half of the said vessel, and that she sold her note to Graham. On the trial, the testimony of counsel was given that the note had been mislaid since suit brought; but no indemnity was offered. Verdict for the plaintiff below. The other facts appear from the opinion.

H. Hubbell and W. Badger, for the plaintiff in error.

E. D. Ingraham, for the defendant in error.

By Court. ROGERS, J. Had suit been brought by Paynter, the payee of the note, it is beyond question the maker would have been liable to set-off, under the agreement given in evidence. But the note being a negotiable instrument, the doubt is whether Graham, to whom it is indorsed, be a *bona fide* holder, without notice, and, as such, not affected by the equities duly existing between the original parties. That Graham knew of the agreement between Paynter and Bisbing was not pretended; at least there is no proof of it; nor is there any proof from which fraud can be inferred. At the trial, the cause was not put on these grounds, but it was contended that inasmuch as Graham, the indorser, was the son-in-law of Paynter, the payee, and the assignment was made out of the usual course of business, and without recourse, there was enough to put him on inquiry, and consequently he stood in no better position than the payee. If the premises are admitted, the conclusion is inevitable. But taken separately, the objections, as will be shown hereafter, amount to nothing; nor are they more to be regarded when taken together; for if you add nothing to nothing, *ad infinitum*, it is still nothing. The fact that Graham was the son-in-law of Paynter weighs nothing in the scale, because a son-in-law, as such, is not bound to know that his father-in-law meditates a fraud by a plain and palpable violation of his agreement. Nor is the fact that the transfer of the note assumes the form of an ordinary assignment, such a departure from the usual course of business as to put the indorsee on his guard against the indorser. Although a blank indorsement in our commercial towns is the usual mode, yet in the country it is so frequently otherwise that it seldom if ever provokes inquiry or observation. That it is made payable without recourse produces no effect, is ruled in *Epler v. Funk*, 8 Pa. St. 468. In that the court properly ruled there was nothing proved in the case to put the indorser upon inquiry. That is the only question submitted to them on this head.

Exception is taken to the admission of Sarah Paynter, wife of David Paynter, the payee's indorser, as a witness. She stands, as is conceded, in the same position with her husband. If he is competent, she is so also, and *vice versa*. That the husband is competent, is ruled in *Epler v. Funk*, 8 Pa. St. 468, on the authority of *Baines v. Ball*, 1 Mass. 73, and *Rice v. Stearns*, 3 Id. 225 [3 Am. Dec. 129]. When an indorser is released, as here, he is competent, as is there expressly held, not to impeach, it is true, but to enforce payment of the note. For

this purpose she was offered, and properly admitted. But was the court bound to nonsuit the plaintiff on the ground that no action can be sustained against the maker of a lost note, without he proffers an indemnity? That the defendant is entitled to indemnity before he can be compelled to pay, I have no doubt; for it may be that the note was indorsed in blank by Graham, and is now in the hands of a holder for value. The time of the indorsement does not usually appear on the bill. This is a contingency against which the maker is entitled to indemnity. The maker ought not to encounter any risk, as he is in no default. The inconvenience, if any, is one to which the holder has exposed himself, arising, perhaps, from his own carelessness, or, as would appear, from the neglect of his agent. In this, all the authorities to which I refer generally agree.

But the question recurs, Is the failure to indemnify in bar of the action? or is it a prerequisite merely to the execution to enforce payment of the judgment? In the absence of all direct authority, in this state at least, I incline to the latter view of the case. However the law may be as to suit brought to recover on a lost note (and I see no reason why there should be any difference), we are of opinion that, when the note is lost after the commencement of the action, it is no objection to the rendition of judgment. Justice may be effectually administered by restraining the plaintiff from issuing his execution, without proper indemnity be given. This is an equitable power vested in the courts, which will take care to do equity, having a proper regard to all the circumstances of each case. It was formerly supposed the courts of this state could not do complete equity, having no power over the costs, which were in all cases to be determined by the event. But this was a narrow and contracted view of the law, long since exploded; and has now, happily, no place in our system of jurisprudence. In cases depending on principles of equity, the courts have, in substance, the powers of a court of chancery, to be administered with the machinery (sometimes clumsy, it is true) of common-law forms.

The judgment is affirmed, the record remitted to the district court, with directions to exact indemnity before execution is permitted to issue.

WITNESS, WHEN NOT INCOMPETENT ON GROUND OF INTEREST: See *Bank v. Fordyce*, 49 Am. Dec. 561, note 565; *Bell v. Western M. & F. Ins. Co.*, 39 Id. 542, note 549, where other cases are collected.

LOST NOTE, IN ACTION OR SUIT ON, WHEN INDEMNITY REQUIRED: See *Truly v. Lane*, 45 Am. Dec. 305, note 307; *Lazell v. Lamell*, 36 Id. 352, note 354, where other cases are collected.

THE PRINCIPAL CASE IS CITED in *Phelan v. Moree*, 67 Pa. St. 66, to the point that a *bona fide* holder for value and without notice of a negotiable note is entitled to recover on it against the maker, free from all subsisting equities between the original parties; and in *Milne v. Marshall*, 5 Phila. 132, to the point that where a proceeding is intended to establish or enforce an equity, which is incomplete at the time when the writ issues, the acts necessary to complete it may, when not requiring to be submitted to or passed on by a jury, be done after verdict and before the judgment is entered or the execution finally issued.

HOPKINS v. FORSYTH. FORSYTH v. HOPKINS.

[14 PENNSYLVANIA STATE, 24.]

WHERE JOINT OWNER OF CHATTEL SUES SHERIFF TO RECOVER HIS PORTION of the balance of the proceeds of a sale of it, made under an execution against some only of the joint owners, an averment of the sheriff in his return that he has paid over the money in contest to one of the owners and agent for the others, is not a legitimate part of the return, and does not estop the plaintiff from showing the truth. The plaintiff's remedy, in such a case, is not by an action for a false return.

FACT THAT BOAT'S HUSBAND HAS POWER TO SELL WHOLE OF HER does not authorize the sheriff to do the same under an execution against him, nor to do more than to sell his share as a part owner.

UNDER EXECUTION AGAINST SOME OWNERS OF CHATTEL SHERIFF MAY SELL the interests of other owners who consent that their shares may be sold, and the parties so consenting may claim their shares of the proceeds of the sale. But other owners, who were not parties to the judgment on which the execution issued, retain their interests, and cannot claim any part of the proceeds of the sale.

JOINT OWNERS OF VESSEL ARE NOT REGARDED AS PARTNERS merely by reason of their joint ownership of her, or from the fact of their using her for a common purpose.

SHIP'S HUSBAND HAS NO SUCH LIEN FOR ADVANCES as a sheriff can satisfy out of the proceeds of a sale of her.

WHERE IT IS AGREED ON TRIAL THAT COURT SHALL DECIDE the law on the undisputed facts, if evidence offered by the defendant is erroneously excluded, the supreme court cannot determine whether such evidence, if it had been admitted, would have been disputed or not, or whether or not the whole case would, in that event, have been submitted to the jury. And whether the court adjudicated on the excluded evidence or not, the judgment must be reversed.

ASSUMPSIT by Hopkins against Forsyth, as sheriff, to recover the plaintiff's proportion of money raised by a sale by the de-

defendant of the interest of the plaintiff in the steamboat *Circasian*, remaining in his hands after payment of the execution on which the sale was made. Oliphant, Duncan, Hopkins, Cox, Gilbert, Troth, Reynolds, and Miller were joint owners of the steamboat. One Bennet recovered a judgment against Oliphant, Duncan, and Hopkins for wages due him as master of the boat. The suit was against the eight owners, but three only were served. On the judgment above mentioned a *fi. fa.* issued, and the sheriff sold the boat, and paid the surplus remaining, after satisfying the judgment and costs, over to Oliphant, one of the owners. Hopkins claimed three tenths of this surplus, and brought suit for that amount. The sheriff stated in his return that he had paid over the surplus to Oliphant, as one of the owners and agent. On the part of the defendant, it was proved that the vessel was to be run on the Ohio river, and that Bennet was to be captain. Oliphant purchased Bennet's share, and took his place in the control of the boat. There was an agreement in writing giving him the control. Defendant offered evidence to show that Oliphant had full power to sell the boat. This was objected to, on the ground that it tended to vary the written instrument, and the question was excluded. Both parties excepted to the decision of the court. The other facts appear from the opinion.

Shaler and McConnell, for Hopkins.

T. Williams, for Forsyth.

By Court, GIBSON, C. J. It is proper to begin with the exceptions of the defendant below, against whom judgment was rendered. The averment of the sheriff that he had paid over the money in contest was not a response to the writ, or, consequently, a legitimate part of the return; and it did not estop the plaintiff from showing the truth. Even had it actually been mispaid, the fact would not have been a defense. For a similar reason, the remedy was not by action for a false return.

The next point to be noticed has been properly abandoned. Doubtless an action on a joint contract of sale, though the interests sold were several, must be brought by all the vendors; but the present action is founded on a contract implied from a consideration, which is the ownership of the property sold; and if that be several, so must the contract be. The nature of the title will be considered presently.

The evidence that the boat's husband had power to sell it was properly excluded; not, however, because it would have

impinged on his written appointment—for it went to an independent fact—but because the fact was immaterial. It would not follow that because he might have sold all the shares the sheriff could do as much on an execution against him, separately or conjunctly, or sell more, by force of it, than his share as a part owner. The sheriff would not have the same power, because his writ gave him power to sell no more than the property of those who were parties to the judgment; not to execute a power given to another. But the evidence that two who had not been served agreed at the sale that the sheriff should sell the boat out and out, was erroneously rejected. Every shareholder whose property went to swell the surplus money, and none else, was entitled to share in the distribution of it. The shares of the parties to the judgment and execution—the plaintiff's among the rest—were sold, and the former owners of them were entitled to come in. Those who were not parties, but agreed that their shares should pass by the sheriff's sale, would be estopped from disputing the purchaser's title; and they also would be entitled to come in. But the two who were not parties, either to the judgment or the agreement, have their shares yet, and are not entitled to come in. The original writ issued against the eight, of whom four were served, and the offer was to prove that two who were not served agreed that the sheriff should sell, not the shares, but the boat, as an entire thing, and consequently that the shares of the two who were not bound either by the judgment or the agreement were not sold; and that the owners of them had no claim to the money in the sheriff's hands. The evidence was offered to reduce the plaintiff's right from a fourth to a sixth, and it ought to have been received.

But it has been pressed on us, in the face of a horn-book principle, that the shareholders were partners; that the sale on the judgment against four of them passed the interests of all; and that all, whether parties to the agreement of sale or not, are entitled. A vessel may undoubtedly be brought into stock where the owners of it are in trade; but not where there is no other relation between them than that which arises from joint ownership. What other was there here? It does not appear that the interests of these owners were connected in anything else than the boat itself. No one would suppose that a joint owner of a wagon and team might not sell his moiety before the debts were got in and the expenses paid, or that joint creditors would have a preference, in respect to it, over sepa-

rate creditors. Carriers may doubtless become partners; but not merely by becoming joint owners of a chattel and using it for a common purpose. And the principle is peculiarly applicable to ships or other craft, the exceptions to it in respect to them being always founded in very special circumstances. This boat appears not to have been a regular packet, but to have done such jobs as her husband could procure; and a partnership is usually formed on some plan of action. It is not to be doubted that one of these owners could not have affected the rest by the admission of a fact to their prejudice. A purchaser from him would have held his share in common with them, free from a lien for advances, and having an equal voice in respect to the employment of the boat or the choice of a husband for it. We are told that the contrary was incidentally ruled in *Burbridge v. Durvall*, a case like the present, except that the point was neither made nor ruled, incidentally nor directly. That all the owners had not been served in the action, which was the foundation of the demand in that case, was neither known nor suspected by the counsel, the trial court, or the court here; and it is not the practice of a court of error to reverse on points that were not ruled below.

The deposition of Cox, produced to show that the plaintiff was in arrear to Oliphant, the purchaser, for advances to the boat, was properly ruled out. The action was not against Oliphant, but against the sheriff, who had no right to retain for a debt due even to himself. *Irwin v. Workman*, 3 Watts, 357, and *Chambers v. Miller*, 7 Id. 63, are direct to the point. A ship's husband has no lien for advances—at least none such as a sheriff may satisfy. He may compel part owners to contribute by action, but he has no other remedy. They resemble partners so far, that each is liable for the whole; but there the resemblance ends, for, as was ruled in *Jaggers v. Binnings*, 1 Stark. 64, the concession of one of them binds himself alone, and each of them may transfer his share at his pleasure. It is clear, therefore, that the sheriff could not involve the plaintiff in a settlement of the boat's accounts.

The exception in the plaintiff's writ of error is, that he ought to have had judgment for a fourth, not merely for a sixth, of the surplus money; and on the undisputed facts arising from the evidence actually admitted, that conclusion would be inevitable—for the judgment, execution, and levy showed no more than that four shares were sold. But the defendant's evidence, to show that six of the eight shares were parted with and paid for, had been erroneously excluded; but had the

plaintiff been allowed a sixth part of the surplus which arose from the price of them, it might perhaps have admitted of a doubt whether the errors would not have compensated each other. It is not our practice to reverse for such as do no mischief. But as the agreement was that the court should decide the law on the undisputed facts, we cannot say that the fact proposed in the defendant's offer would not have been disputed had the evidence been admitted, or that the whole case might not then have been put before the jury. Had the court adjudicated on the excluded evidence, as they have done without it, we would still have been bound to send the cause to another trial, in order that the jury might give the plaintiff a fourth or a sixth, or whatever his proportion of a share may be, as they should find the fact to be.

Judgment reversed, and *venire de novo* awarded.

PURCHASERS OF VESSEL ARE TENANTS IN COMMON where they are not partners in trade: *Millburn v. Guyther*, 50 Am. Dec. 681.

SHIP'S HUSBAND, AUTHORITY OF: See *Hewett v. Buck*, 35 Am. Dec. 242.

SHERIFF'S RETURN, HOW FAR CONCLUSIVE: See *Knowles v. Lord*, 34 Am. Dec. 525, note 530, where other cases are collected; *Mentz v. Hamman*, Id. 546, note 549.

PART OWNERS OF VESSEL, WHEN CONSIDERED PARTNERS: See *Jones v. Pitcher*, 24 Am. Dec. 716.

McKINNEY v. MONONGAHELA NAVIGATION CO.

[14 PENNSYLVANIA STATE, 68.]

WHERE SPECIFIC REMEDY IS PROVIDED BY STATUTE FOR RECOVERY OF DAMAGES sustained by a person from the construction by a corporation of a work of internal improvement, he cannot have a common-law action therefor.

CASE brought in the district court of Alleghany county. The defendants erected dams in the Monongahela river for its slack-water. The plaintiff owned a tract of land on the river, several acres of which were rendered useless since the construction of the dam, by being overflowed in times of freshets. This was the injury complained of. The court below held that the common-law remedies were entirely excluded by the acts which gave a special remedy in such a case. The other facts appear from the opinion.

Hawkins and Darragh, for the plaintiff in error.

Williams, for the defendant in error.

By Court, GIBSON, C. J. A rule laid down in *Castle's Case*, Cro. Jac. 644, and followed in *Rex v. Robinson*, 2 Burr. 803, as well as in subsequent cases, is that where a statute has created a new offense by prohibiting a thing that was lawful before, and appointed a new remedy for it by a particular sanction and particular method of proceeding, that particular method must be followed, and no other. In delivering the opinion of the court in the latter case, Lord Mansfield added that where the offense was antecedently punishable by a common-law proceeding, and a statute has prescribed a particular remedy for it by a summary proceeding, either method may be pursued because the sanction is cumulative. The propositions are convergent. They were predicated of remedies for public wrongs; but there is nothing peculiar in the subject-matter of them to show that they are not equally predicable of remedies for private injuries. An indictment, as in the case of a forcible entry and detainer, is sometimes a substantive remedy for a civil tort; and there is no other means to compel a putative father to maintain his illegitimate child. If the provision of the statute which provides an indictment for fornication and bastardy were repealed, no lawyer would advise that the mother or the township could maintain an action for it. Why should not the same principle rule the case in hand? Against the state, being a sovereign power, no action lay at the common law. Whenever an action has been maintained against her, it has been by force of her express permission; as in the case of the Pennsylvania claimants of compensation for lands certified and ceded to Connecticut claimants in the seventeen townships of Luzerne county. The government is restrained by the constitution from taking private property for public purposes; but though a statute pretending to authorize a public agent to take it without compensation made or security given, would not protect him, the state herself could not be sued. Here the action is not for taking property, but for injuring it; and as an action lies not against the estate for direct or consequential damage, it lies not against her *locum tenens*, clothed with her power and protected by her shield. She is not always in a condition to execute her works of public improvement with her own hand; and her prerogative would be useless did it not extend to the instruments with which she is compelled to work. Though corporations employed by her have always been ordered to pay for damage to private property, they have not been subjected to prosecution by action for the consequences of acts permitted by the charter. A specific

remedy has been provided, not only against such corporations, but against the state herself, where she was the immediate constructor; in which the compensation has been assessed by viewers or a court and jury on appeal from their award; in a common-law action, never. No corporation would accept a charter on terms which would expose it to an interminable series of suits for continuance of nuisances. In *Schuylkill Navigation Company v. Thoburn*, 7 Serg. & R. 411, it was held that the compensation awarded is the price of a perpetual privilege, assessed once for all. The legislature, having obtained the defendant's leave to modify its charter, might have subjected the company to actions of nuisance had they seen fit; but the acts of 1844 and 1848 clearly did no more than enlarge the field of the specific remedy; and the plaintiff can have recourse to no other.

Judgment affirmed.

WHERE PROCEEDINGS FOR ASSESSMENT OF DAMAGES FOR PROPERTY INJURED by grading a street are authorized, the party injured must resort to such proceedings, and cannot sustain an action at law: *Hickox v. City of Cleveland*, 32 Am. Dec. 730.

THE PRINCIPAL CASE IS CITED in *New York & Erie R. R. Co. v. Young*, 33 Pa. St. 180, to the point that the grantees of a franchise from the state have the same power that existed in the state, and may exercise it subject only to such restrictions as are imposed in the grant, and they are subject only to the same liability, unless otherwise declared; in the *Pennsylvania R. R. Co. v. Lutheran Congregation*, 53 Id. 449, to the point that the right of trial by jury has never been held to belong to the citizen himself, in proceedings by the state under her power of eminent domain. In *Cumberland Valley R.R. Co. v. McLanahan*, 59 Id. 28, to the point that when the legislature has provided a specific remedy for the recovery of damages for injuries sustained by the construction of a work of internal improvement by a corporation, a party cannot have recourse to a common-law action; in *Koch v. Williamsport Water Co.*, 65 Id. 290, to the point that it is not a constitutional requirement that the damages should be paid over before possession is taken or the injury occurs, in cases of eminent domain; and in *West Branch & Susquehanna Canal Co. v. Mulliner*, 68 Id. 360, to the point that unless the act of incorporation of the corporation provides for it, consequential damages are not recoverable from a railroad or other improvement company, for injuries done by it in constructing or maintaining its works.

FORSYTH v. PALMER.

[14 PENNSYLVANIA STATE, 98.]

IN ACTION OF TRESPASS AGAINST SHERIFF FOR SELLING ONE PERSON'S GOODS on an execution against another, the latter is a competent witness to prove that the goods belonged to the former. In such action, the

sheriff may show, in mitigation of damages, that the goods were bought in for the owner at an undervalue; for the measure of damages in such a case is the amount that it cost the plaintiff to redeem with interest thereon.

TRESPASS brought by Palmer against Forsyth, who was then sheriff, for seizing and selling his goods under an execution against Mrs. Rhodes. On the trial, Mrs. Rhodes was offered as a witness by the plaintiff, to prove that the goods were his. The defendant objected to her as incompetent, but she was admitted. Defendant afterwards offered to prove by Mrs. Rhodes, in mitigation of damages, that a large part of the goods sold were bought in for the plaintiff. This offer was objected to by the plaintiff, and the evidence was rejected. Verdict for the plaintiff.

Wills, for the plaintiff in error.

Austin, for the defendant in error.

By Court, GIBSON, C. J. As defendant in the execution on which the goods were sold, the witness was clearly disinterested. In *Keymborg v. Burbridge*, 11 Pa. St. 535, the plaintiff had sent the cigars to Bollman, the witness for whose debt they were seized and sold as a commission merchant accountable to him for the proceeds; from which accountability he was not discharged by the seizure and sale of them on Burbridge's execution; but he would have been discharged from it had Keymborg recovered satisfaction from Burbridge, and he was therefore an incompetent witness to enforce it. Here the creditor of the witness is not the party who sues, but the substantive party sued. In that case, the witness was liable to the party who called him; in this, he had been discharged by the sheriff's return.

But the defendant ought to have been allowed to show, in mitigation of damages, that the plaintiff had bought in his goods at an undervalue. The measure was the actual, not the speculative, loss. The primary end of damages is compensation; and not of every injurious consequence that may have been suffered, for a different rule would let in compensation for time, trouble, and counsel fees—but of what is accurately called in Mr. Sedgwick's valuable treatise on the measure of damages, page 31, the legal injury, which sets the machinery of the law in motion. That machinery is necessarily imperfect; for much suffering, vexation, and anxiety is often inflicted, which cannot be subjected to its action. But the rule in the English and American courts, subject to very special excep-

tions, is to give actual compensation, by graduating the amount of the damages exactly to the extent of the loss. It is peculiarly, but not exclusively, applicable to damages for breach of contract. Thus, for not delivering a commodity purchased and paid for, the measure of damages is not the price given, but the market value at the time and place appointed for the delivery. The vendee can then sue; and his cause of action being complete, cannot be varied by the state of the market afterwards, else he might lie by for years, with a view to increase the damages. The vendee has a right to receive the thing bargained for, or an equivalent which will enable him to procure it from another; and when he has received the equivalent, it is the same to him as if he had received the article itself from the vendor. So much, therefore, he is entitled to recover by action. I am aware that the decisions are discrepant where the price has been prepaid; but I cannot conceive how the rule of compensation can be altered by it, or more just than when it gives the vendee a pecuniary equivalent for actual performance at the time appointed for it. When the market price happens to be the contract price, a vendee who has paid nothing recovers nothing but nominal damages; because to execute the contract specifically, would take from him the contract price and give him nothing in return for it that he could not obtain for the same price. Where he has paid the contract price, he obtains the same result by getting it back; and so much he is entitled to demand by action. Where the market price has fallen below the contract price, he is entitled to recover back so much of what he has paid as is equal to the market price, because for so much he may purchase the article from another; where he has paid nothing, he will not be apt to sue for nominal damages, lest, peradventure, he might have the depreciated article forced on him at the contract price. When the market price has risen above the contract price, he is entitled to the difference in addition to what he has paid; if he has paid nothing, then to the difference only. Surely this gives the vendee just compensation by giving him the advantages he would have had from a specific execution of the contract at the day; and if that be so, it is impossible to see how payment of the contract price beforehand, being an accident which admits of remuneration, should involve the vendor in subsequent fluctuations of value; or why the vendee should be benefited by a rising market and not prejudiced by a falling one. This, however, is not the place to discuss the merits of the difference between the

English and the Pennsylvania rule; nor, since the decision in *Smethurst v. Woolston*, 5 Watts & S. 106, is it open to discussion by us.

The rule which aims at actual compensation is applicable to cases of involuntary escape from arrest on mesne process; to cases of conversion of choses of action; to cases of trespass to personal property; and to almost every other case of tort. On this rule was decided *Baker v. Freeman*, 9 Wend. 36 [24 Am. Dec. 117], the counterpart of the case before us. What did the plaintiff below lose by the illegal seizure and sale of his goods? Just what it cost him to redeem them. He is not at liberty to turn the injury into a benefit, or his loss into gain; or to make profit of his goods at the defendant's expense by buying them back at a discount. A different question would have been presented, had the goods been sold at a sacrifice to a stranger. In *O'Conner v. Forster*, 10 Watts, 418, it was said that the proper compensation to be made by a carrier prevented from transporting the goods, is the difference between the stipulated price and the price for which they might have been carried. Doubtless, the consignor is bound, in such a case, to procure another carrier on reasonable terms, if he can. But was the plaintiff bound to redeem his goods with cash diverted from his business? Certainly not. But he did redeem them; and he is entitled only to the sum advanced by him, with interest.

Judgment reversed, and a *venire de novo* awarded.

SHERIFF IS LIABLE FOR VALUE OF PROPERTY, where he sells property of one person under an execution against another. But he ought not to be held liable in vindictive damages, where he has great difficulty in ascertaining the title to the property seized: *Duperron v. Van Wickle*, 39 Am. Dec. 509, note 512.

THE PRINCIPAL CASE IS CITED in *Nagle v. Mullison*, 34 Pa. St. 53; in *McKnight v. Ratcliff*, 44 Id. 169; and in *Seely v. Alden*, 61 Id. 305, to the point that, in the absence of proof of aggravation, the rule of damages is that compensation is the extent of the recovery; and in *Waugenheim v. Childs*, 23 Cal. 446, to the point that the vendor is a competent witness for his vendee in contests respecting the validity of sales between the creditors of a vendor and his vendee.

FORSYTH v. MATTHEWS.

[14 PENNSYLVANIA STATE, 100.]

WHERE WRIT OF ERROR BRINGS UP FORMAL BILL OF EXCEPTIONS, a court of error is strictly to confine its attention to what is presented by the bill and its proper appendages.

BILL OF EXCEPTIONS MAY CONTAIN RECITAL OF EVIDENCE IN EXTENSO, or it may consist of a condensed statement of such of the facts proved, or

which the testimony tended to prove, as is necessary to the proper comprehension of the points ruled by the court, and the instructions given to the jury.

ASSIGNMENT OF PERSONAL PROPERTY WITHOUT ACTUAL TRANSFER OF POSSESSION, gives no title to the assignee against the creditors of the assignor. And where there is a conflict of testimony as to the change of possession, the question should be left to the determination of the jury.

SALE MADE FOR PURPOSE OF DEFRAUDING CREDITORS IS VOID, even though there be a transfer of possession; but whether or not a transfer was made with intent to defraud, is a question to be left to the jury.

TRANSFER TO FATHER OF HIS CHILD'S PERSONAL PROPERTY, when the latter is deeply indebted, naturally arouses suspicion of fraud, but is not *per se* proof of fraud, and the effect to be legitimately inferred from it, it is the province of the jury to deduce.

FACT THAT PERSONAL PROPERTY IS TRANSFERRED BY FORMAL INSTRUMENT in writing, is not a matter of much importance in determining whether or not there is fraud in the transaction.

TRESPASS brought by George Matthews against Forsyth, for levying, as sheriff, on certain personal property on an execution against Edwin C. Matthews, who was the son of the plaintiff. Edwin C. Matthews had been the lessee of an eating-house, and while carrying it on contracted the debts for which the judgment was rendered upon which the execution above mentioned issued. While E. C. Matthews was indebted, he transferred by bill of sale to his father, the plaintiff in this suit, the leasehold, bar-fixtures, furniture, liquors, etc. It was alleged that there was no change of possession after this sale. The sheriff seized and sold the personal property in the eating-house under the execution against E. C. Matthews, and the plaintiff, George Matthews, claimed the property and brought suit to recover for said seizure and sale. The charge of the court below on the matter of the bill of sale, to which reference is made in the opinion, is as follows: "Great stress has been laid upon the formal written character of this transfer, but you will not, perhaps, consider this as being of much importance. Perhaps all such transfers should be expected to be in writing. The peculiarity of form depends upon the person who is employed to write the instrument. An old lawyer would write it in one way, a young lawyer in another, and a merchant's clerk in another way. I cannot see that the form which one would adopt should be more liable to the charge of fraud on its face than the form adopted by any other." There was a verdict for the plaintiff. The other facts appear from the opinion.

McCandless, for the plaintiff in error.

Geyer, for the defendant, but the court declined to hear him.

By Court, BELL, J. In this case, the writ of error brings up a formal bill of exceptions, duly sealed by the judge before whom the cause was tried. Were it not that the carelessness of practice in many of our judicial districts, and the loose manner in which records in error are made up, have almost banished the formal bill of exceptions, it would be scarcely necessary to remark that in reviewing the action of the subordinate tribunal, a court of error is strictly to confine its attention to what is presented by the bill, and its proper appendages. It may contain a recital, *in extenso*, of the evidence given on the trial, or, as in this instance, it may consist of a condensed statement of such of the facts proved, or which the testimony tended to prove, as is necessary to the proper comprehension of the points ruled by the court, and the instructions given to the jury.

The bill before us, after stating the sale of the goods in question, by Edwin C. Matthews to the plaintiff below, and the consideration of the contract, avers that the evidence tended to show the possession of the goods sold had been delivered to the purchaser, at the date of the agreement of sale; after which, the latter conducted the eating-house in which they were found, in his own name. On the other hand, the defendant below gave evidence tending to show there had been no open and manifest change of possession in pursuance of the sale. Here, then, was a conflict of testimony, which must necessarily be referred to the jury. This the court did, with the instruction that an assignment of personal property, without an actual transfer of the possession, gave no title to the assignee, as against the creditors of the assignor; and if there was no such transfer of possession, the plaintiff could not recover. This was certainly correct. Had there been no proof of a transfer of possession, correspondent with the sale, it would have been incumbent on the court to direct the jury, as matter of law, that as against creditors the sale was naught, and therefore the plaintiff could not recover: *Young v. McClure*, 2 Watts & S. 147. But under the contrariety of proof which appears to have been given here, whether there was an absolute change of possession or not, was a question for the jury. Had the court undertaken to assert, authoritatively, the presence of a legal fraud, it must have been a usurpation upon the other branch of the tribunal, and consequently error.

The instruction that if the sale and transfer of possession was made for the purpose of defrauding the creditors of the vendor the plaintiff could not recover, was also unexception-

able. Such an intent imports actual fraud, destructive of a sale of goods, irrespective of the actual possession of them. Its existence or non-existence is a fact to be determined by the jury; and when it is found, the court declares its legal consequence. This, in effect, was the course pursued on the trial of the cause; of which the defendant below complains, apparently under the misapprehension that it was the duty of the judge to declare both the fact and the law, as the evidence stood there—a misapprehension which is sufficiently refuted by pointing it out.

The remaining portions of the charge to which the assignments of error refer are in strict accordance with settled principle. The transfer to a father of his child's personal property, when the latter is deeply indebted, and more especially if he be in danger of an immediate execution, naturally arouses suspicion of fraud, and adds to the weight of other evidence, tending to prove it.

But such facts are not necessarily *per se* proof of fraud. They may be consistent with innocence, though deeply suspicious; and the effect legitimately to be inferred from them, it is the province of the jury to deduce. Upon this province, the learned judge below did not seek to intrude.

What was said by him of the so-called bill of sale is but the expression of a sentiment relative to matter of fact, which even if incorrect, is not the subject of error in this court. But I do not perceive anything objectionable in the remarks submitted on this point. Such evidences of sale are common, and being usually prepared by attorneys or scriveners, naturally assume a technical form. I remember what is said in *Twyne's Case*, 3 Co. 80, as to the inferences of fraud deducible from unusual pains and care taken in the preparation and conduct of a suspicious transaction; but I cannot see that it is fairly applicable here. Written transfers of personal chattels are frequently used, as an easy and convenient medium of proof; and it would be going very far to say that much importance is due to their presence as *indicia* of fraudulent motive. Still, under certain circumstances, such a precaution may weigh something in the scale of nearly balanced doubts, and the right of the jury to consider it, in this connection, is nowhere denied by the charge.

Judgment affirmed.

RETENTION BY VENDOR OF POSSESSION OF GOODS AFTER SALE, EFFECT OF:
See *Fleming v. Townsend*, 50 Am. Dec. 318, note 326, where other cases are collected.

TRANSFER BY PERSON IN FAILING CIRCUMSTANCES: See *Howe v. Wayman*, 49 Am. Dec. 126; *Rucker v. Abell*, 48 Id. 406, note 409, where other cases are collected.

BILL OF EXCEPTIONS, COURT CANNOT GO OUTSIDE OF: See *State v. Godwin*, 44 Am. Dec. 42; *Hatch v. Potter*, 43 Id. 88; *Vass v. Commonwealth*, 24 Id. 695.

BILL OF EXCEPTIONS, WHAT SHOULD CONTAIN: See *Braver v. Strong's Executors*, 44 Am. Dec. 514, note 518, where other cases are collected.

KERR v. DAY.

[14 PENNSYLVANIA STATE, 112.]

AGREEMENT TO GIVE LESSEE OF LAND OPTION OF PURCHASING It may be enforced by him, although the election to purchase rests solely with him, and this optional right may be transmitted by him to his vendee. The lessee has an equitable estate in the land under his contract for an optional purchase, which passes to his alienee, vesting him with the right to call for a specific execution on declaring his election. And this right may be enforced against a second purchaser with notice, from the original vendor.

ACTUAL POSSESSION OF LAND BY OR UNDER ONE HOLDING CONTRACT FOR CONVEYANCE thereof to him, where such possession is consistent with the contract, is sufficient to affect with notice a second purchaser from the original vendor.

WHERE ONE OF TWO JOINT OWNERS OF LAND, WHO ARE BOUND BY CONTRACT TO CONVEY IT, transfers his interest to his co-owner, the latter will then be bound to convey to the party entitled to demand such conveyance, even though such party be his former co-owner, who joined with him in the contract.

EJECTMENT for a lot of land, brought by Day against Kerr and Trunick. Warden and Alexander were joint owners of the lot in question, and on the first day of April, 1845, they executed to Cuddy a lease of the lot for three years, in which it was agreed that Cuddy should have the privilege of buying it at any time during the continuance of the term. On the first of July, 1847, Warden conveyed his interest in the lot to Alexander. On the twenty-ninth of July, 1847, Cuddy assigned to Warden his interest in the agreement for a conveyance. August 9, 1847, Alexander conveyed the lot to Day, the plaintiff in this action. On the twenty-second of August, 1849, Warden assigned to Trunick all his right, etc., in the agreement. It was proved by one Carnahan that, at the time of the conveyance from Alexander to Day, he, Carnahan, was in possession of the property as the tenant of Cuddy; that after the assignment to Warden he paid rent to Warden; and that the defendant Kerr entered into possession when he, Car-

nahan, left. Kerr was a tenant under Warden. The judge instructed the jury: 1. That the facts testified to by Carnahan did not amount to constructive notice of the title claimed by the defendant under the agreement of April 1, 1845; 2. That an agreement to give a party an option of purchasing certain land is a mere personal covenant or agreement, and not such an agreement as vests any interest, legal or equitable, in the land which is the subject of the contract; and that the defendant, claiming under such agreement alone, without any act of election previous to the sale to plaintiff, had no such title to the land as furnishes the foundation of a defense to an action of ejectment. Verdict for the plaintiff. Other facts appear from the opinion.

Woods, for the plaintiff in error.

Watson, for the defendant in error.

By Court, BELL, J. The ground upon which a chancellor executes an executory contract for the sale of lands is, that equity looks upon things agreed to be done as actually performed; consequently, when an agreement is made for the sale of an estate, the vendor is considered as a trustee, for the purchaser, of the estate sold, and the purchaser as a trustee of the purchase-money for the vendor: *Green v. Smith*, 1 Atk. 572; *Craig v. Leslie*, 3 Wheat. 578. The vendee is, in contemplation of equity, actually seised of the estate, and is, therefore, subject to any loss which may happen to it between the agreement and the conveyance, and will enjoy any benefit which may accrue in the same interval. As a consequence, he may sell or charge the estate before conveyance executed: *Seton v. Slade*, 7 Ves. 265; *Attorney-General v. Day*, 1 Ves. sen. 220; *Paine v. Meller*, 6 Ves. 352; and the death of either vendor or vendee, even before the time of completing the contract, is held to be entirely immaterial: *Winged v. Lefebury*, 2 Eq. Cas. Abr. 32, pl. 43; *Paul v. Wilkins*, Toth. 44; *Barker v. Hill*, 2 Ch. R. 218. As a result of this principle, which seems to be of general application, it is settled that an estate under contract of sale is regarded as converted into personalty, from the time of the contract, notwithstanding an election to complete the purchase rests entirely with the purchaser; and if the seller die before the election be exercised, the purchase-money, when paid, will go to his executors as assets: *Sikes v. Lister*, 5 Vin. Abr. 541, pl. 28; *Baden v. Pembroke*, 2 Vern. 213. But if, from defect of title, insufficiency of contract, or other cause, the court should think the contract ought not to be carried into execu-

tion, a conversion is prevented, and the estate will go to the heir at law of the vendor, as though no contract had ever existed: *Lacon v. Mertins*, 3 Atk. 1; *Buckmaster v. Harrop*, 7 Ves. jun. 341; *Rose v. Cunynghame*, 11 Id. 550. So, also, if one covenant to lay out a sum of money in the purchase of land, generally, and devises his real estate before he has made the purchase, the money agreed to be laid out will pass to the devisee, as representing land: *Green v. Smith*, 1 Atk. 573. These illustrations of the doctrine of conversion are familiar instances in which the rule that agreements to be performed are considered as performed, has been practically applied, and might, I think, without further aid, be accepted as decisive of the doctrine which the defendant below invoked as sufficient for his protection in this action. Upon the trial, however, it was distinctly made a question whether the option, vested in Cuddy, by the agreement of April 1, 1845, to purchase the property or not within a given period, does not distinguish this case from those I have adverted to; or, if not, then whether the plaintiff below can be considered as a *bona fide* purchaser, without notice of Cuddy's equity, and so relieved from the obligation to convey which vested in his vendor, Alexander. A little further examination will show both these points to be definitely settled against the plaintiff by a train of uncontroverted authority. These decide that equitable conversion takes place, although the election to purchase rests solely with the purchaser, whose optional right may be transmitted to his vendee; and that notice of this right will be imputed to a second purchaser from the original vendor through an actual possession of the land agreed to be sold, consistent with the contract.

The first instance in which, I believe, the principal question arose was before Lord Kenyon at the rolls in 1785, and was singularly like the case in hand in its leading features. It is thus stated by Lord Eldon, in *Ripley v. Waterworth*, 7 Ves. 436, where, as well as in subsequent cases, it was approved and followed: Whitmore demised to Douglass for seven years, with a covenant that if the tenant, after the twenty-ninth of September, 1761, and before the twenty-ninth of September, 1765, should choose to purchase the inheritance for three thousand pounds, Whitmore would convey to him. In 1761, before any election, Whitmore died and left all his real estate to Bennett in fee, and all his personal estate to Bennett and his sister equally, as tenants in common. In 1765, before the time mentioned, Walter, who purchased the lease and benefit

of the agreement from Douglass, called on Bennett to convey for three thousand pounds, which conveyance was made in consideration of that sum. Afterwards, the sister and her husband filed a bill against the representative of Bennett, claiming a moiety of the three thousand pounds and interest, and it was decreed accordingly, and, added the chancellor, "though the testator could never have compelled the lessee to purchase, yet when the assignee made the election, it was held the personal estate of the testator, and not to belong to the devisee of the real estate." Another case, parallel in principle, is noticed as having been mentioned before Lord Kenyon, of one who, having a timber estate, agreed to sell a given quantity per annum to be chosen by the vendee. The owner died, and a vast deal of timber was cut after his death. That timber, though in the option of the buyer, was held to be the personal estate of the party to the contract. In *Townley v. Bedwell*, 14 Id. 591, Lord Eldon again cited the first of these cases, as *Lawes v. Bennett*, 1 Cox, 167, and followed it as furnishing a governing rule. The principal case was this: A testator had executed a lease to one Townley for thirty-three years, with a proviso that if Townley, his executors, administrators, or assigns, should be desirous to purchase the premises within six years, he should pay to the testator, his heirs or assigns, six hundred pounds for the purchase, upon having a good title made to him (Townley), his executors, administrators, or assigns. The testator died before the expiration of the six years, and within that period Townley declared his option to purchase, according to the proviso. The heir of the testator claimed the rents and purchase-money, on the ground that until Townley declared his option, the estate continued to be realty, and the declaration being made after the death of the testator, it so descended, and, consequently, the price of it belonged to the heir. The case was ably argued by eminent counsel, for the heir at law and next of kin. After reflection, the lord chancellor adhered to *Lawes v. Bennett*, *supra*, and though he gave the rents which accrued before Townley's declaration, to the heir, he decreed the price of the land to the next of kin, because, by relation, the election to purchase turned the estate into personalty, in the life-time of the testator.

In *Daniels v. Davison*, 16 Ves. 253, *Lawes v. Bennett* is again approvingly noticed, under the name of *Douglas v. Witterwonge*, and is said to have turned upon the doctrine that, when the lessee made his option to purchase, he was to be considered as the

owner *ab initio*. Indeed, the determination can only be supported by attributing to the lessee an equitable estate in the land, under his covenant for an optional purchase, which passed to his alienee, vesting him with the right to call for a specific execution on declaring his election.

In *Daniels v. Davison*, *supra*, the bill for a specific execution stated an agreement by Davison to sell to Daniels a public house, called The Plough, then in the occupation of Daniels, for the sum of two hundred pounds, on or before the twenty-fifth of March next ensuing; that before the day the plaintiff tendered the purchase-money and demanded a conveyance, but the defendant refused to perform the contract, and sold the premises to the other defendant, Cole, and charging Cole with notice. No doubt was intimated of the equitable interest of Daniels, the only question being of the notice imputed to Cole, the second purchaser. And on the authority of *Taylor v. Stibbert*, 2 Ves. 437, it was ruled, in effect, that where a tenant for years agrees to purchase, his possession, though under the lease, is notice of his equitable interest as purchaser, to a subsequent purchaser, who is bound to inquire and inform himself of all the contents of the lease and the covenants contained in it, as well as of all the interests and estates claimed by the tenant. Having failed to do so, he will be decreed to convey to the first vendee, leaving the original seller and the second purchaser to settle their rights between themselves. In delivering the judgment, Lord Eldon took occasion to say: "Where there is a tenant in possession under a lease or an agreement, a person purchasing part of the estate must be bound to inquire on what terms that person is in possession. If, for instance, he is occupying tenant under a lease for forty-five years, the purchaser is bound by the fact that he is entitled to that term, if he does not choose to inquire into the nature of his possession; the tenant being in no fault, but enjoying according to his title. Then if, in the instance of such a term, the tenant would be entitled against the purchaser, why is not his title good for a greater interest? In the case of *Douglas v. Witterwonge* [*sub nom. Lawes v. Bennett*, 1 Cox, 167], the tenant was not bound to know and did not know, that it was necessary for him to make any communication of the option which he had by the contract with his landlord, to become the purchaser; and Lord Kenyon held that there was nothing that could affect his conscience in favor of the purchaser, having no communication with him. My opinion, therefore, considering this as depending on notice, is, that this tenant being in possession under a lease, with an

agreement in his pocket to become the purchaser, those circumstances altogether give him an equity, repelling the claim of a subsequent purchaser, who made no inquiry as to the nature of his possession." When the case came up again for a final decree, 17 Ves. 433, the same doctrine was repeated. "With regard," said the chancellor, "to the subsequent sale by the defendant Davison to the other defendant, Cole, my notion is that the plaintiff has an equity to have a conveyance of the premises from Cole, upon the ground that Cole must be considered, in equity, as having notice of the plaintiff's equitable title under the agreement; that Cole was bound to inquire, and therefore, without going into the circumstances, to ascertain whether he had or had not actual notice, he is to be considered as a purchaser of the other defendant's title, subject to the equity of the plaintiff to have the premises conveyed to him at the price which he had by the agreement stipulated to pay to that defendant." I have cited these observations thus at length because they furnish a full answer to the objection raised in our case, on the score of alleged want of notice to the plaintiff below. Carnahan's possession, as the tenant of Cuddy, is attended with the same effect in imposing the duty of inquiry upon Day, the second purchaser, as though Cuddy himself had been in possession; more especially as Carnahan had attorned to Warden, the assignee of Cuddy. The necessity of this inquiry is enforced by our own cases of *Jaques v. Weeks*, 7 Watts, 261; *Lewis v. Bradford*, 10 Id. 67; *Boggs v. Varner*, 6 Watts & S. 474, and a case decided at the last term for this district, but not yet reported. As the case is then presented by the record, Warden, having purchased Cuddy's equitable interest, entitled himself to a conveyance of the land, by his notice of an election to purchase, within the time stipulated by the covenant. Day, the plaintiff below, having bought the legal title from Alexander, under notice of Cuddy's equity, stands in Alexander's place, in respect to the covenant of sale, is subject to the same duty, and is bound to perform all the person he represents would be bound to do, were the legal title yet in him: *Taylor v. Stibbert*, 2 Ves. jun. 437; *Crofton v. Ormsby*, 2 Sch. & Lef. 583. If, in addition to the case already cited, other authorities were necessary to show that Alexander's alienation to Day worked no effect upon the previous rights of Cuddy and his assignee, they may be found in *Echliff v. Baldwin*, 16 Ves. 267; and *Curtis v. Marquis of Buckingham*, 3 Ves. & Bea. 168, recognizing the chancellor's power to restrain a vendor from conveying the legal estate to a third person, be-

cause such a measure might put the purchaser to the expense of making another party to the suit.

It is scarcely necessary to add that whatever right may reside in Warden as vendee of Cuddy, is in no degree affected by the fact that he was one of the parties who as owner covenanted with Cuddy to convey, on a compliance by the latter with the stipulations of the agreement. By Warden's subsequent conveyance to Alexander of all his interest in the property, the duty of fulfilling the covenant of sale was cast upon the latter, as owner of the legal title. Considered simply as a covenant real, Warden became a stranger to it, and was consequently in a position, at the time of his purchase from Cuddy, to acquire the right to claim a conveyance from Alexander, or from his grantee, upon determining of the option given by the original agreement.

Upon the case as it now stands, Kerr, as representing Warden, is entitled to retain the possession of the property. Should Warden, upon offer of a legal conveyance, fail to fulfill the stipulations on his part to be performed, of course the relative rights of the parties would undergo a change.

Upon both the points made below, the learned judge before whom the case was tried fell into an error, attributable, no doubt, to the necessary rapidity of a trial at bar, and the consequent difficulty of looking into the books. In the argument submitted to us, the subject was very insufficiently explored, and we can, therefore, easily believe the district court derived but little assistance from the research of counsel.

Judgment reversed, and a *venire de novo* awarded.

CONTRACT BINDING ON ONE PARTY ONLY may be decreed to be specifically performed: *Rogers v. Saunders*, 33 Am. Dec. 635. The principal case is cited in *Corson v. Mulvany*, 49 Pa. St. 100, and in *Shollenberger v. Brinton*, 52 Id. 99, to the point that an agreement for the purchase of land at the option of the vendee will, on election and notice, be specifically enforced; and in *Siter, James, & Co.'s Appeal*, 26 Id. 180, to the point that when articles of agreement are entered into for the sale and purchase of real estate, the purchaser is regarded in equity as the owner of the land, subject to the payment of the stipulated price.

SUFFICIENT PERFORMANCE TO TAKE CASE OUT OF STATUTE OF FRAUDS: See *Weed v. Terry*, 45 Am. Dec. 257, note 265, where other cases are collected.

DELIVERY OF POSSESSION PURSUANT TO CONTRACT IS PART PERFORMANCE: See *Pugh v. Good*, 37 Am. Dec. 534, note 541, where other cases are collected.

ASSIGNEE OF NOTE GIVEN FOR PURCHASE PRICE OF LAND may by a bill filed against the vendor and vendee compel the specific performance of the contract of purchase: *Hanna v. Wilson*, 46 Am. Dec. 190.

THE PRINCIPAL CASE IS DISTINGUISHED in *Elder v. Robinson*, 19 Pa. St. 365.

DEWEY v. ERIE BOROUGH.

[14 PENNSYLVANIA STATE, 211.]

WHERE BUYER OF CLOCK AGREES TO PAY FOR IT at the expiration of a year, on condition that it performs to his satisfaction, the contract to pay becomes absolute at the end of that time, unless, within a reasonable time, he offers to return it and gives notice of his dissatisfaction. If the residence of the seller is unknown, or if he resides in another state, the buyer must, in order to excuse his failure to give notice and to offer to return, show that he used due diligence to ascertain the seller's residence.

DEBT on a promissory note, given by the defendant to the plaintiff in part payment of a clock, to be paid in one year from its date, conditioned, however, that the said clock performed to the satisfaction of the burgess and town council, or their successors. There was a verdict for the defendants. The other material facts appear from the opinion.

Lane and Galbraith, for the plaintiff in error

Babbitt, contra.

By Court, GIBSON, C. J. The transaction before us is analogous to a transaction between merchants, called "sale or return;" by the terms of which the party to whom the goods are sent is bound to return them, with notice of his dissent, within a reasonable time, or keep them on the terms of the offer; or it is perhaps strictly a conditional sale, of which the same principle is an element. Such was the sale in *Humphries v. Carvalho*, 16 East, 45, and many other cases, which it is unnecessary to quote, the principle being settled; and the business is to apply it to the evidence. The defendant promised to pay the price at the expiration of a year, on condition that the clock should perform to the satisfaction of the burgess and town council, or their successors. The corporation, consequently, had a year to signify its determination. This is not a case of warranty, and it is immaterial whether the clock performed well or ill; it was the business of the burgess and council to judge of that, and keep the clock or return it, at the proper time. It was put up, and the plaintiff, who was probably a clock peddler, went away. The burgess and council were ultimately dissatisfied with it, and after two years took it down, but did not offer to return it, or attempt to give notice of their dissatisfaction. Three witnesses testified that they had not heard of the plaintiff's whereabouts, then or since; the other witnesses were silent in respect to it. It is clear and indisputable law, that the burgess and council were bound to give

notice of their dissatisfaction, with an offer to return the clock, or attempt to do it. They were not bound to follow the plaintiff to a foreign country; but if foreign residence had been alleged, they would have been bound to prove it. If his residence was unknown, they were bound to prove that they had attempted to discover it. If it was known to be in a sister state, they were bound to prove that they had attempted to reach him through the post-office. But there was not a spark of evidence to prove that any effort had been made whatever: and the contract had become absolute. The cause, therefore, was not put on its proper point.

Judgment reversed, and a *venire de novo* awarded.

VENDEE CANNOT RETAIN PROPERTY AND TREAT SALE AS VOID: See *Johnson v. McLane*, 43 Am. Dec. 102, note 106, where other cases are collected; *Evans v. Gale*, Id. 614; *Masson v. Bovee*, Id. 651, note 654.

BROCKET v. OHIO AND PENNSYLVANIA R. R. Co.

[14 PENNSYLVANIA STATE, 241.]

RIGHT TO REMOVE DWELLING-HOUSE IS INCLUDED IN RIGHT TO ENTER UPON LAND and appropriate as much of it as may be necessary for its railroad, granted to the Ohio and Pennsylvania Railroad Company by the Ohio act, adopted by the Pennsylvania act of April 11, 1848.

CERTIORARI to the common pleas of Beaver county. The proceeding in this case was had under the Ohio act, chartering the Ohio and Pennsylvania Railroad Company, which act was adopted by the legislature of Pennsylvania. The company filed an act of appropriation and description of the lands and tenements of Brocket, intended to be taken. Appraisers were appointed, who appraised and assessed the damages at five hundred dollars. Brocket filed exceptions, which were subsequently overruled. The other facts appear from the opinion.

Shannon, for the plaintiff in error.

Agnew, for the company.

By Court, GIBSON, C. J. This is a question, not of power, but of intention. The constitution subjects all private property without distinction to public use; and a dwelling-house may be taken for it as legitimately as a forest or a field. Had not the Pea Patch island in the Delaware been previously purchased by the United States, it might have been adversely taken for the site of the present fortress, and the buildings on it might

have been demolished. Houses are often taken down to make way for streets; and in this city two thoroughfares have been opened through blocks of houses to a neighboring street. In Philadelphia, the occurrence of such things is frequent. What is more to the purpose, the state railroad from that city to Columbia passes diagonally through blocks of houses in the city of Lancaster. The single question, therefore, is whether the word "land," in this joint act of incorporation, is to have its legal meaning, or if there be a difference, its popular one.

The jurisprudence of the enacting states is based upon the common law of England, whose rules of interpretation are our rules; and it is text-book law, that terms of art in a statute or a deed are to be taken in their technical sense, because they have a definite meaning, which is supposed to have been understood by those who were or ought to have been learned in the law. In England, every act of parliament, as well as every conveyance, is drawn by counsel. The word "land," both there and here, is a term of art, and the most comprehensive one that could be applied to the subject of a grant. Lord Coke says that it is *nomen generalissimum*, that it includes everything fixed to the ground, and everything above or below the surface of it; that it comprehends castles, houses, and other buildings; and that, not only the soil, but everything in it or on it passes by it. It therefore distinctly includes a mansion, when its generality is not restrained by the context.

But the other provisions of the section in which it occurs have nothing to show that the word was used in a peculiar sense. They authorize the company to enter on land, and appropriate as much of it, "except timber," as may be necessary for its purposes; and why an exception, if the word "land" was not supposed to embrace everything else? The expression of one thing is the exclusion of another; and consequently no further exception was intended. The word "premises," which includes every part and parcel of a messuage, is used in the section as its synonym, and the term "property," which is a very general one, is used in the same sense. The company is authorized to purchase the land, or interest of an infant or insane person from his guardian or committee; or to take it, in case of a disagreement, by an act of appropriation. It can take without agreement whatever it can take with it; and no one will doubt that a guardian or committee thus authorized might sell a dwelling-house. It was evidently the purpose of the framers of the act to put into the company's hands every

means, without restriction, that might conduce to the perfection of the work.

If, then, the general effect of this technical word is not restrained by express provision or necessary implication in the context, what reason is there to think that dwellings were intended to be excepted from the effect of it? The joint act of incorporation is not only a contract with the company, but a compact between the states that are parties to it; and it is not to be supposed that private interests would be allowed to stand in the way of the greatest thoroughfare in the world; and one by which the valley of the Mississippi and the cities of the seaboard must be infinitely benefited. The charter is not to be compared with the charter from an individual state; it is to be liberally construed with reference to the magnitude of the enterprise, by giving the company the necessary means to accomplish the purposes of its creation. Like a treaty, it is the law of the contracting states, without being subject to interpretation by the local usages of either. The same construction of it must be made in both.

But if that were otherwise, the consequence would be the same; for we know of no legislative or popular interpretation of the word that would restrain the meaning of it. On the contrary, our legislation has been consistent with the broadest use of it. Power to interfere with houses, churches, or burying-grounds was expressly withheld from the Central Railroad Company, and sometimes, but not always, it has been withheld from turnpike and canal companies. It was not withheld from the canal commissioners in laying the state railroad and canals; and so far as legislative interpretation goes, it shows that express exemption was thought necessary where it was intended; and that no pervading prejudice has been felt for the inviolability of the citizens' castle. The abodes of the living are not more inviolable than the abodes of the dead; yet thousands of human bones lie beneath the walks and alleys of Washington square in Philadelphia, once its potter's field, now its most frequented pleasure-ground. If a cemetery cannot impede the march of improvement for purposes of recreation, how can the owner of a cottage expect that it will impede a work of necessity? The legislation of a country necessarily takes its tone from the temper and the necessities of the age. A house, a church, a grave-yard, or anything else, may be conveniently privileged in an act to incorporate a turnpike or canal company, because it may be avoided without

lessening the usefulness of the work; but every deflection from a right line in the bed of a railroad is proportionately productive of danger to property and life. It is indispensable to safety and speed that the route of it be as direct as the surface of the country will permit; but they could not be attained in a settled country if every hovel or house were privileged; and thus a *quasi* national work, intended for posterity, might be botched through a respect for the sacredness of temporary erections. The course of a railroad might be insuperably obstructed by the obstinacy of a proprietor in the gorge of a mountain, or the pass be made at least difficult and dangerous. A mangled passenger, inquiring the reason of a deflection, when the cause of it had disappeared, might be told of our infinite respect for property at the expense of safety; but the information would neither ease his pain nor set his leg.

Abuse of the company's power in the exercise of it is remedial or imaginary. Every delegated power may be abused, but it follows not that power must not be delegated. It is incredible that the directors would turn a family out of doors at an inclement season, and incur personal liability, to show their authority, for the abuse of which they would become trespassers from the beginning; while the assessors of compensation would incline to make the company itself smart for it. It is idle to suppose that a dwelling-house will be removed unnecessarily or wantonly. A proprietor's family is dealt with tenderly, to prevent a pretext for swelling the compensation. A company's injury to private property is considered a windfall, and the proprietor never fails to get out of it at least all that is in it. He has got it in this case, and the act complained of is authorized by the charter. The exceptions to the award are therefore unfounded.

Award of the arbitrators, and judgment of the common pleas affirmed.

COULTER, J., dissented.

CITED in *Cleveland & Pittsburg R. R. Co. v. Speer*, 56 Pa. St. 332, and in *Covey v. Pittsburg, F. W., & C. R. R. Co.*, 3 Phila. 176, to the point that a charter granted by two states to a company to construct a railroad is not only a contract with the company, but a compact between the states. It is to be liberally construed with reference to its objects. Like a treaty, it is the law of the contracting states, not being subject to interpretation by the local usages of either. The same construction must be made in both. Also in the latter case, to the point that authority to enter on "land" extends to the dwelling-house in which the owner resides.

CHRISTY v. BARNHART.

[14 PENNSYLVANIA STATE, 260.]

POSSESSION, TO TAKE PAROL GIFT OF LANDS OUT OF STATUTE OF FRAUDS, must be taken in pursuance of the gift. If taken before the alleged gift, it will not have that effect.

EJECTMENT by Barnhart and others against Christy and the minor children of William Barnhart, deceased, for one hundred acres of land. The plaintiffs claimed as heirs of Jacob Barnhart, and the defendants as heirs of William Barnhart, who was a son of Jacob Barnhart. Fifty-one acres and one hundred and two perches of the land in dispute was admitted to have belonged to Jacob, and to have been at one time part of his old place. The defendants claimed that this portion of the one hundred acres was given by Jacob to his son William, by parol gift. William took possession in 1830. Jacob had the land surveyed for him in 1837. In 1838 the land was assessed in the name of William. Before that time it was assessed to Jacob. As to the balance of the one hundred acres, the defendants claimed that it was bought from McCall by Jacob expressly for William. The evidence showed that Jacob paid part of the purchase-money and William paid the remainder. In reference to the gift, the court charged the jury that if the evidence is that the possession was taken before the alleged contract of gift, then the defendants would not have any title by the alleged gift. There was a verdict for the plaintiffs for portions of the land in dispute.

Timblin, for the plaintiffs in error.

Purviance, for the defendants in error.

By Court, BELL, J. It is not to be disputed, at this time of day, that to withdraw a parol sale of lands from the blighting effects of the statute of frauds, there must be an open and absolute possession taken in pursuance of the contract, with a view to the performance of it. It is, consequently, a settled rule that a parol sale to a tenant in possession is within the statute, though his possession be afterwards continued, because there is no change of possession in execution of the contract: *Galbreath v. Galbreath*, 5 Watts, 146; *Brawdy v. Brawdy*, 7 Pa. St. 157. This has been thought indispensable, and it certainly is so, notwithstanding the inferences the plaintiff in error seeks to draw from *Lee v. Lee*, 9 Id. 169. That case was decided under its peculiar circumstances; and although I did not unite with my brethren in ruling it, I am authorized to say

it was not for a moment intended to draw into question a principle which lies at the very foundation of the equity invoked. Much less was it the object of the determination to assert that assessment of the land sold in the name of the vendee, and payment of taxes by him, is equivalent to a change of possession. It proceeded principally on the ground of an exchange of property, followed by a corresponding possession and subsequent sale of one of the tracts exchanged, which put it out of the power of the plaintiff to reinstate the before-existing relations of the parties. It was thought possession of one of the tracts, in conjunction with the assessment of the other in the name of the tenant's vendee, might be accepted as tantamount to an actual corresponding possession of both the tracts. Had there been no possession by the plaintiff, there would have been no pretense for the position that the transaction was not within the statute. As it is, the case carried the exception as far as it can be urged with any degree of safety. A step further would abrogate the statute itself. The court below was consequently right in its direction to the jury on this point. What was said is in entire accordance with the facts proved, and harmonizes with the law springing from them. In respect of the fifty acres which originally belonged to the father, it is indisputable the son was in possession prior to the alleged gift, which possession was continued without visible change. As to the fifty acres purchased from McCall, the jury found the plaintiffs were entitled to one moiety of it, by way of resulting trust. Of the other moiety, they were correctly told, the plaintiffs could recover, unless there was an absolute gift of it, and possession taken in pursuance of the gift.

Judgment affirmed.

WHAT ACTS CONSTITUTE PART PERFORMANCE OF VERBAL CONTRACT SO AS TO TAKE CASE OUT OF STATUTE OF FRAUDS.—It is well settled that the part performance of a verbal contract within the statute of frauds has no effect at law to take the case out of its provisions: See the note to *Norton v. Preston*, 32 Am. Dec. 129, where this subject is discussed at length; also to the same effect the following recent cases: *Creighton v. Sanders*, 89 Ill. 543; *Wheeler v. Frankenthal*, 78 Id. 124; *Warner v. Hale*, 65 Id. 395; *Pike v. Morey*, 32 Vt. 37; and note to *Eaton v. Whitaker*, 44 Am. Dec. 591.

DELIVERY AND ACCEPTANCE OF GOODS TO TAKE VERBAL SALE OUT OF STATUTE OF FRAUDS.—This subject is fully discussed in the note to *Shindler v. Houston*, 49 Am. Dec. 325 et seq.

DOCTRINE OF PART PERFORMANCE IS EQUITABLE DOCTRINE, and is confined in its operation to contracts relating to the sale of lands, and to contracts relating to agreements made upon the consideration of marriage; *Pomeroy's Spec. Perf. Cont.*, sec. 101; 3 *Pomeroy's Eq. Jur.*, sec. 1409, and note. And the ground upon which courts of equity proceed in holding that

part performance of a contract within the statute of frauds takes the case out of the statute, is that it would be a fraud upon the party who, in reliance upon the contract and pursuant thereto, has partly performed it, to permit the other party to refuse performance on his part. Nothing, therefore, can be considered as a part performance such as to take the case out of the statute, unless it puts the party performing into a situation which is a fraud upon him unless the agreement is fully performed: 1 Story's Eq. Jur., sec. 761; Browne's Stat. Frauds, sec. 447 et seq.; *Meach v. Perry*, 6 Am. Dec. 719; *Bryan v. Southwestern R. R. Co.*, 37 Ga. 26; *Burnett v. Blackmar*, 43 Id. 569; *Hobbs v. Wetherwax*, 38 How. Pr. 385; *Neale v. Neales*, 9 Wall. 1.

In the case last cited, Mr. Justice Davis, delivering the opinion of the court, said: "The statute of frauds requires a contract concerning real estate to be in writing; but courts of equity, whether wisely or not it is too late now to inquire, have stepped in and relaxed the rigidity of this rule, and hold that a part performance removes the bar of the statute, on the ground that it is a fraud for the vendor to insist on the absence of a written instrument, when he had permitted the contract to be partly executed." The doctrine of part performance as applied to agreements for the sale of lands is intimately connected with the equitable doctrine of specific performance. The agreements to which the doctrine of part performance can be applied are such agreements as equity would decree the specific performance of, in case they had been in writing. And the agreement itself must be one for which the legal remedy of damages would be inadequate, and for which the equitable remedy of specific execution would be possible: Pomeroy's Spec. Perf. Cont., sec. 99.

WHAT ARE NOT ACTS OF PART PERFORMANCE.—As all acts to be regarded as acts of part performance must be done in pursuance of the contract, it follows necessarily that acts done prior to the making of an agreement cannot be a part performance of it: Pomeroy's Spec. Perf. Cont., sec. 110; *Eckert v. Eckert*, 3 Penr. & W. 332; *Dougan v. Blocher*, 24 Pa. St. 28. Neither are acts which are merely preparatory, introductory, or ancillary to the agreement alleged, to be considered as part performance: Browne's Stat. Frauds, sec. 460; Pomeroy's Spec. Perf. Cont., sec. 110; *Earl of Glengal v. Barnard*, 1 Keen, 769; *Cooth v. Jackson*, 6 Ves. 12; *Clerk v. Wright*, 1 Atk. 12; *Thynne v. Earl of Glengal*, 2 H. L. Cas. 131; *Popham v. Eyre*, Loft, 786; *Whitchurch v. Bevis*, 2 Bro. C. C. 559; *Redding v. Wilkes*, 3 Id. 400; *Montacute v. Maxwell*, 1 P. Wins. 618; *Hawkins v. Holmes*, Id. 770; *Reeves v. Pye*, 1 Cranch C. C. 219; *Colgrove v. Solomon*, 34 Mich. 494; *Gratz v. Gratz*, 4 Rawle, 411; *Givens v. Calder*, 2 Desau. 171. Thus the tendering of a deed is not such a part performance as takes the case out of the statute: *Graham v. Theiss*, 47 Ga. 479; *Sands v. Thompson*, 43 Ind. 18. Nor is the giving of orders to have conveyances drawn, and going to view the estate: *Clerk v. Wright*, 1 Atk. 12; nor preparing a lease: *Phillips v. Edwards*, 33 Beav. 440; nor putting a deed into the hands of a solicitor to prepare a conveyance of the estate: *Redding v. Wilkes*, 3 Bro. C. C. 400; nor delivering an abstract of title and giving instructions to prepare deeds: *Smith v. Smith*, 1 Rich. Eq. 130; nor going on the land and measuring the lines: *Gratz v. Gratz*, 4 Rawle, 441.

PAYMENT OF CONSIDERATION IS NOT PART PERFORMANCE, and will not take a verbal contract for the sale of land out of the statute. This subject is discussed in the note to *Townsend v. Houston*, 27 Am. Dec. 745. See also *Johnston v. Glancy*, 28 Id. 45; *Pinnock v. Clough*, 42 Id. 521; *Rucker v. Steelman*, 3 Id. 396; *Arnold v. Stephenson*, 79 Id. 126.

WHAT ARE ACTS OF PART PERFORMANCE.—Possession alone, without payment or other acts of ownership, is sufficient part performance of a verbal sale of land to take the case out of the statute of frauds, and to sustain an action for the specific execution of the contract: *Browne's Stat. Frauds*, sec. 467; *Pomeroy's Spec. Perf. Cont.*, sec. 115; *Danforth v. Laney*, 28 Ala. 274; *Arrington v. Potter*, 47 Id. 714; *Pindall v. Trevor*, 30 Ark. 249; *McCarger v. Rood*, 47 Cal. 138; *Jefferson v. Jefferson*, 96 Ill. 551; *Rucker v. Steelman*, 73 Ind. 396; *Arnold v. Stephenson*, 79 Id. 126; *Anderson v. Simpson*, 21 Iowa, 399; *Lamb v. Hinman*, 46 Mich. 112; *Harris v. Knickerbacker*, 5 Wend. 638; *Murray v. Jayne*, 8 Barb. 612; *Ellis v. Ellis*, 1 Dev. Eq. 180; *Jamison v. Dimock*, 95 Pa. St. 52; *Reynolds v. Johnson*, 13 Tex. 214; *Harris v. Crenshaw*, 3 Rand. 14; *Seaman v. Ascherman*, 51 Wis. 678; *Lacon v. Mertins*, 3 Atk. 1; *Boardman v. Mostyn*, 6 Ves. 467; *Coles v. Pilkington*, L. R. 19 Eq. Cas. 174; *Ungley v. Ungley*, L. R. 4 Ch. Div. 73; *Pugh v. Good*, 37 Am. Dec. 534; *Eaton v. Whitaker*, 44 Id. 586; 1 *Story's Eq. Jur.*, sec. 761; 4 *Kent's Com.* 451; *Roberts on Frauds*, 147.

Possession, in order to constitute a part performance such as to take a parol sale of land out of the statute of frauds, must be: 1. Notorious: *Brady v. Brady*, 7 Pa. St. 157; *Moore v. Small*, 19 Id. 461; *Charriot v. Sigerson*, 25 Mo. 63; *Browne's Stat. Frauds*, sec. 473. 2. Exclusive: *Frye v. Shepler*, 7 Pa. St. 91; *Moore v. Small*, 19 Id. 461; *Haslet v. Haslet*, 6 Watts, 464; *Browne's Stat. Frauds*, sec. 474. 3. It must be of the tract claimed: *Browne's Stat. Frauds*, sec. 475; *Pugh v. Good*, 37 Am. Dec. 534; *Glass v. Hulbert*, 102 Mass. 24; *Beardsley v. Duntley*, 69 N. Y. 577. 4. It must appear to have been delivered or assumed in pursuance of the contract alleged: *Wills v. Stradling*, 3 Ves. 378; *Gregory v. Mighell*, 18 Id. 328; *Savage v. Carroll*, 1 Ball & B. 265; *Kine v. Balfe*, 2 Id. 343; *Wood v. Thornly*, 58 Ill. 464; *Judy v. Gilbert*, 77 Ind. 96; *Carrolls v. Cox*, 15 Iowa, 455; *Mahana v. Blunt*, 20 Id. 142; *Anderson v. Simpson*, 21 Id. 399; *Wilmer v. Farris*, 40 Id. 309; *Barnes v. Boston & Me. R. R.*, 130 Mass. 388; *Rosenthal v. Freeburger*, 26 Md. 75; *Ham v. Goodrich*, 33 N. H. 32; *Cole v. Potts*, 10 N. J. Eq. 67; *Welsh v. Bayard*, 21 Id. 186; *Armstrong v. Kattenhorn*, 11 Ohio, 265; *Atkin v. Young*, 12 Pa. St. 15; *Greenlee v. Greenlee*, 22 Id. 225; *Peckham v. Barker*, 8 R. I. 17; *Wilde v. Fox*, 1 Rand. 165; *Browne's Stat. Frauds*, sec. 476; *Pomeroy's Spec. Perf. Cont.*, sec. 123; *Johnston v. Glancy*, 28 Am. Dec. 45. 5. The possession must be continued and retained under the alleged agreement: *Browne's Stat. Frauds*, sec. 485; *Chambliss v. Smith*, 30 Ala. 366; *Rankin v. Simpson*, 19 Pa. St. 471; *Dougan v. Blocher*, 24 Id. 28; *Davis v. Moore*, 9 Rich. L. 215.

POSSESSION MUST BE TAKEN WITH CONSENT of the vendor, in order to have the effect of a part performance: *Pomeroy's Spec. Perf. Cont.*, sec. 119; *Moore v. Hijbee*, 45 Ind. 487; *Jacobs v. Peterborough etc. R. R. Co.*, 8 Cush. 223; *Freeman v. Freeman*, 43 N. Y. 34; *Howe v. Rogers*, 32 Tex. 218; *Purcell v. Miner*, 4 Wall. 513. But where it is shown that the possession was taken and held with the knowledge of the vendor or lessor, and that he made no objection to it, his consent will be presumed: *Gregory v. Mighell*, 18 Ves. 328; *Millard v. Harvey*, 34 Beav. 237; *Lord v. Underdunck*, 1 Sandf. Ch. 46; *Jervis v. Smith*, Hoffm. Ch. 470; *Sage v. McGuire*, 4 Watts & S. 228; *Goucher v. Martin*, 9 Watts, 106; *Thompson v. Scott*, 1 McCord Eq. 32; *Purcell v. Miner*, 4 Wall. 513.

EXPENDITURES MADE ON IMPROVEMENTS upon the land constitute a part performance, which will take a parol agreement relating to the sale or leasing thereof out of the statute, especially in cases where such improvements

are incapable of compensation by damages. Where valuable improvements have been made by the purchaser on the faith of the agreement, courts of equity will not permit the vendor to set up the statute of frauds in bar to an action for the execution of the contract. Whatever doubts may exist in other cases, there is none in cases where valuable improvements have been made and possession has been taken under and in pursuance of the verbal contract. In such cases, the party who has misled the other, to the latter's injury, will not be permitted to profit by his own fraud: *Browne's Stat. Frauds*, sec. 487; *Pomeroy's Spec. Perf. Cont.*, sec. 126; *Cummings v. Gill*, 6 Ala. 562; *Byrd v. Oden*, 9 Id. 755; *Blakeney v. Ferguson*, 8 Ark. 272; *Hoffman v. Felt*, 39 Cal. 109; *Green v. Finia*, 35 Conn. 178; *Tate v. Jones*, 16 Fla. 216; *McDowell v. Lucas*, 97 Ill. 489; *Bohanan v. Bohanan*, 96 Id. 591; *Laird v. Allen*, 82 Id. 43; *Northrop v. Boone*, 66 Id. 368; *Hall v. Hamelrigg*, 45 Ind. 576; *Moreland v. Lemastera*, 4 Blackf. 383; *Glass v. Hulbert*, 102 Mass. 24; *Pfiffner v. Stillwater & St. P. R. R. Co.*, 23 Minn. 343; *Hanlon v. Wilson*, 10 Neb. 138; *Casler v. Thompson*, 4 N. J. Eq. 59; *Harder v. Harder*, 2 Sandf. Ch. 17; *Cummins v. Nutt*, Wright (Ohio), 713; *Moss v. Culver*, 64 Pa. St. 414; *Milliken v. Dravo*, 67 Id. 230; *Detrick v. Sharrard*, 95 Id. 521; *Johnson v. Bowden*, 37 Tex. 621; *Hibbert v. Aylott*, 52 Id. 230; *Lowry v. Buffington*, 6 W. Va. 249; *Tracy v. Tracy's Heirs*, 14 Id. 243; *School District No. 3 v. Macloon*, 4 Wis. 79; *Ingles v. Patterson*, 36 Id. 373; *Littlefield v. Littlefield*, 51 Id. 23; *Neale v. Neales*, 9 Wall. 1; *Swain v. Seamans*, Id. 254; *Ungley v. Ungley*, L. R. 4 Ch. Div. 73; *Wetmore v. White*, 2 Am. Dec. 323, note 329; *Parkhurst v. Van Cortland*, 7 Id. 427, note 442. Wells, J., delivering the opinion of the court in *Glass v. Hulbert*, 102 Mass. 35, said: "The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its performance, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscionable injury and loss. In such case, the party is held, by force of his acts or silent acquiescence which have misled the other to his harm, to be estopped from setting up the statute of frauds."

Improvements relied upon to constitute a part performance must be valuable, permanently beneficial to the estate, and involving a sacrifice to the purchaser who made them: *Browne's Stat. Frauds*, sec. 488; *Pomeroy's Spec. Perf. Cont.*, sec. 128; *Wack v. Sorber*, 30 Am. Dec. 269; *Hamilton v. Jones*, 3 Gill & J. 127; *Davenport v. Mason*, 15 Mass. 85; *Wolfe v. Frost*, 4 Sandf. Ch. 72; *Hollis v. Edwards*, and *Deane v. Izard*, 1 Vern. 159. It has been held that if the purchaser has been fully compensated by the improvements, a specific performance of the contract will not be decreed: *Ash v. Daggy*, 6 Ind. 259; *Eckert v. Eckert*, 3 Penr. & W. 332; *Browne's Stat. Frauds*, sec. 489. *Wack v. Sorber*, *supra*. It is, however, difficult to reconcile the doctrine in these cases with the doctrine that possession alone constitutes a sufficient part performance to take the case out of the statute; and it is doubtful whether they do not proceed upon a misconception of the reason upon which courts of equity act in decreeing that part performance of a parol contract is sufficient to take a case out of the operation of the statute. In many cases where possession has been taken and improvements made on the faith of the parol agreement, it is evident that the refusal of the vendor would be a fraud upon

the vendee, although he might be compensated for his actual expenditures. Besides, if compensation is to be regarded as a bar to a specific execution of the contract, in most cases it would be a mere matter of time when such compensation would become sufficient to prevent a specific performance. But the doctrine of part performance would seem to have been established, not for the purpose of making compensation, but with the view of preventing a party who has misled another from turning a statute enacted to prevent frauds into an engine of fraud and deception: *Wetmore v. White*, 2 Am. Dec. 323; *Town v. Needham*, 24 Id. 246; *Johnston v. Glancy*, 28 Id. 45; *Weed v. Terry*, 45 Id. 257; note to *McCampbell v. McCampbell*, 15 Id. 63, and the cases there cited.

The manner in which the purchaser makes the expenditures will not be taken into account, for, as Lord Thurlow said in *Whitbread v. Brockhurst*, 1 Bro. C. C. 404, 417, "whether the money has been well or ill laid out is indifferent; the fraud is the same:" Browne's Stat. Frauds, sec. 489.

ACTS OF PART PERFORMANCE MUST BE UNEQUIVOCALLY IN EXECUTION of the parol agreement, where they are relied upon to take the case out of the statute of frauds; and the agreement itself must be certain and definite in its terms: *Carlisle v. Fleming*, 1 Harr. (Del.) 421; *Wallace v. Rappleye*, 103 Ill. 229; *Chesapeake & O. C. Co. v. Young*, 3 Md. 480; *Semmes v. Worthington*, 38 Id. 298; *Morgan v. Bergen*, 3 Neb. 209; *Brown v. Brown*, 33 N. J. Eq. 650; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Harris v. Knickerbocker*, 5 Wend. 638; *Byrne v. Romaine*, 2 Edw. Ch. 445; *Rathbun v. Rathbun*, 6 Barb. 98; *Ellis v. Ellis*, 1 Dev. Eq. 180; *Church of the Advent v. Farrow*, 7 Rich. Eq. 378; *Wright v. Pucket*, 22 Gratt. 370; *Parkhurst v. Van Cortlandt*, 7 Am. Dec. 427; note to *Jackson v. Murray*, 17 Id. 58, and the cases there cited; *Squire v. Harder*, 19 Id. 446; *Townsend v. Houston*, 27 Id. 732; *Johnston v. Glancy*, 28 Id. 45; *Robbins v. McKnight*, 45 Id. 406; and see the note to *Atwood v. Cobb*, 26 Id. 661, where the general subject of certainty in a contract requisite for specific performance is fully discussed. Any act which can be referred to a title distinct from the parol agreement under which the party seeking performance claims, cannot be considered as operating to take the case out of the statute: *Brennan v. Bolton*, 2 Dr. & War. 349; *Frame v. Dawson*, 14 Ves. 386. And the acts of part performance, which will estop a party from insisting upon the statute of frauds, must be on the part of the person seeking the performance, and not by the person insisting on the statute: *Rathbun v. Rathbun*, 6 Barb. 98.

EQUITY PROTECTS PAROL GIFT OF LAND equally with a parol agreement to sell it, in case the gift is accompanied by the possession of the land given, and the donee has, induced by the promise to give, made valuable improvements on the property: *Neale v. Neales*, 9 Wall. 1; *Manly v. Howlett*, 55 Cal. 94; *Freeman v. Freeman*, 43 N. Y. 34. In the latter case, Grover, J., delivering the opinion of the court, said: "The question then is, whether a parol promise by one owning lands to give the same to another will be enforced in equity, when the promisee has been induced by the promise to go into possession, and with the knowledge of the promisor, make comparatively large expenditures in permanent improvements upon the land. It is and must be conceded, that if the promise by parol was to sell the land for a valuable consideration to be paid therefor by the promisee, such promise, under this precise state of facts, would be enforced. The ground upon which this equitable jurisdiction is exercised, although sometimes said to be part performance, really is to prevent fraud being practiced upon the parol purchaser by the seller, by inducing him to expend his money upon improvements upon the faith of the contract, and then deprive him of the benefit of the expendi-

ture, and secure it to the seller by permitting the latter to avoid the performance of his contract. In the case supposed, there has been no part performance of the contract, strictly speaking, except the taking possession; no part of the purchase-money having been paid, and yet the cases are numerous where performance of such contract has been decreed in equity, where possession has been taken under the contract, and large expenditure upon permanent improvements made. In the present case, possession has been taken under the promise, and the expenditures upon improvements made; yet it is insisted that equity will not enforce the promise, for the reason that it was to give, instead of having been to sell the land for a valuable consideration. Permitting the promisor to avoid performance operates as a fraud as much in the latter as in the former case, so far as expenditures upon improvements are concerned. The counsel for the appellant insists that there has been no part performance of the contract to give the land. The answer to this is, that possession has been taken, and valuable improvements made upon the faith of the promise. These facts constitute part performance by the respondents. It is true that the plaintiff has done nothing by way of performance on his part. It is not necessary that he should. Part performance by the party seeking to enforce the contract is sufficient. It is further insisted that an executory promise, not founded upon any valuable consideration, is a mere *nude pact*, furnishing no grounds for an action at law, and that performance of such a promise will not be enforced in equity. This is true so long as the promise has no consideration. Anything that may be detrimental to the promisee or beneficial to the promisor, in legal estimation, will constitute a good consideration for a promise. Expenditures made upon permanent improvements upon land, with the knowledge of the owner, induced by his promise, made to the party making the expenditure, to give the land to such party, constitute in equity a consideration for the promise." Possession alone is not, it seems, sufficient part performance to take a parol promise to give lands, out of the statute. Something more must be shown. But where, in addition, expenditures have been made on the faith of the promise, such expenditures, coupled with the taking of possession, will suffice to take the case out of the operation of the statute: *Browne's Stat. Frauds*, sec. 467; *Pomeroy's Spec. Perf. Cont.*, sec. 130; *Gwynne v. McCauley*, 32 Ark. 97; *Mims v. Lockett*, 33 Ga. 9; *Bright v. Bright*, 41 Ill. 97; *Galbraith v. Galbraith*, 5 Kan. 402; *Poorman v. Kilgore*, 26 Pa. St. 365; *Harris v. Richey*, 56 Id. 395; *Shellhammer v. Ashbaugh*, 83 Id. 24; *Sower v. Weaver*, 84 Id. 262; *Dugan v. Gittings*, 43 Am. Dec. 306. Slight and temporary improvements or trivial outlays will not constitute a sufficient part performance to take a parol gift of lands out of the statute: *Pomeroy's Spec. Perf. Cont.*, sec. 131; *Young v. Glendenning*, 6 Watts, 509; *Wack v. Sorber*, 30 Am. Dec. 269. In the case of *Young v. Glendenning*, Gibson, C. J., delivering the opinion, said: "Slight and temporary erections for the tenant's own convenience doubtless give no equity; but permanent improvements give an indefeasible title to have the contract executed." In a few states, however, it is held that no part performance of a verbal promise to make a gift of lands is sufficient to take the case out of the statute: *Pinckard v. Pinckard*, 23 Ala. 649; *Forward v. Armstead*, 46 Am. Dec. 246; *Ridley v. McNairy*, 2 Humph. 174; *Boze v. Davis*, 14 Tex. 331.

PAROL PROMISE MADE IN CONSIDERATION OF MARRIAGE is void by the statute of frauds, and the marriage is not such a part performance as will take the case out of the statute: *Browne's Stat. Frauds*, sec. 459; *Pomeroy's Spec. Perf. Cont.*, secs. 101, 133; 1 *Story's Eq. Jur.*, sec. 768; *Caton v. Caton*, L.

R. 1 Ch. App. Cas. 137; *Ungley v. Ungley*, L. R. 4 Ch. Div. 73; *Flenner v. Flenner*, 29 Ind. 564; *Brown v. Conger*, 8 Hun, 625; *Finch v. Finch*, 10 Ohio St. 501. But in the case of *Ungley v. Ungley*, L. R. 4 Ch. Div. 76, Malins, V. C., delivering the opinion, said: "I must say in this case, as I have said on similar occasions before, that the decisions are to be regretted which have uniformly held that marriage is not part performance, so as to take parol contracts out of the statute." But although marriage itself is not a part performance, marriage in connection with other acts may be: Pomeroy's Spec. Perf. Cont., sec. 101, 133; *Ungley v. Ungley*, L. R. 4 Ch. Div. 73; *Neale v. Neales*, 9 Wall. 1; *Dugan v. Gittings*, 43 Am. Dec. 306. Thus in the case last cited, it was held that the delivery of possession of property given by a father to his daughter as a marriage portion, in pursuance of the gift, and the fulfillment of the consideration upon which it was to attach, by the consummation of the marriage, withdrew the contract from the reach of the statute of frauds. And in the case of *Ungley v. Ungley*, *supra*, it was held that where a father verbally promised, in contemplation of his daughter's marriage, to give her a house, and she and her husband took possession of the house, the possession so taken, in connection with the consummation of the marriage, took the contract out of the operation of the statute. And Malins, V. C., in delivering the opinion, said: "I should say, therefore, that if A is about to marry, and proves a promise on behalf of the intended wife's father that he will give him a house on his marriage, that is a void contract, because it is not in writing; but if that promise is followed, upon the marriage, by possession, that simple fact, if it be for an hour only, ought, in my opinion, as being a part performance of the promise, to take the case out of the statute of frauds, and the party who has got the contract thus perfected by part performance is in just as good a situation as if he had a contract in writing by the father saying that 'in consideration of the marriage, I will give or settle upon you a house.'"

LABOR AND SERVICES DONE BY VENDEE for the benefit of the vendor which cannot be adequately compensated by an award of damages, if the plaintiff cannot be restored to his original position, will, under special circumstances, constitute a part performance of an agreement to convey lands in consideration of such labor and services: Pomeroy's Spec. Perf. Cont., sec. 135; *Twiss v. George*, 33 Mich. 253; *Sutton v. Hayden*, 62 Mo. 101; *Hiatt v. Williams*, 72 Id. 214; *Johnson v. Hubbell*, 10 N. J. Eq. 333; *Van Dwyne v. Vreeland*, 12 Id. 142; *Davison v. Davison*, 13 Id. 246; *Rhodes v. Rhodes*, 3 Sandf. Ch. 279. In *Twiss v. George*, a step-son, on attaining his majority, was about to leave home and make his own way in the world, when his step-father verbally agreed with him that if he would remain at home and take care of the family, he would deed to him one half of the farm. The step-son remained at home and took care of the family, and the court decided that he was entitled to a specific performance of the agreement. In the case of *Davison v. Davison*, a father agreed with his son, on the latter's attaining his majority, that if he would remain with him and work the farm and take care of the rest of the family, he would at his death leave him the farm. The son performed his part of the agreement, and specific performance was decreed on the ground of part performance. In *Rhodes v. Rhodes*, two brothers, one having a family and the other being single, owned a farm in common, on which they had always lived together. The unmarried brother became subject to very distressing epileptic fits, after which he made a verbal agreement with the other brother to give him all his property, provided he would take care of him as long as he lived. The married brother and his family affec-

tionately cared for the afflicted brother for many years and up to the time of his death. It was held that this constituted such a part performance of the verbal agreement as took it out of the operation of the statute. The assistant vice-chancellor, in delivering the opinion in that case, said: "It is settled that the payment of the consideration will not, in general, be deemed such a part performance as to relieve a parol contract from the operation of the statute. But the reason for this, viz., that in such a case the repayment of the consideration will place the parties in the same situation in which they were before, shows that the rule applies to a moneyed consideration only. If the consideration for the contract be labor and services, those may sometimes be estimated and their value liquidated in money, so as measurably to make the vendee whole on rescinding the contract. But in a case like this, where the services to be rendered were of such a peculiar character that it is impossible to estimate their value to Andrew Rhodes by any pecuniary standard, and where it is evident that he did not intend to measure them by any such standard, it is out of the power of any court, after the performance of the services, to restore Henry Rhodes to the situation in which he was before the contract was made, or to compensate him in damages. The case is clearly within the rule which governs courts of equity in carrying parol agreements into effect where possession has been taken or moneys laid out in improvements upon the land sold."

MUTUAL WILLS.—A verbal promise to make a will of all the testator's estate, real and personal, in favor of a person who in consideration thereof agrees to make a similar will in favor of the first testator, and who makes one accordingly, is a contract within the statute of frauds, and the making of such will is not such a part performance as will take it out of the statute: *Gould v. Mansfield*, 103 Mass. 408; *Izard v. Middleton*, 1 Desau. 116.

MISCELLANEOUS.—Possession taken by a purchaser under an agreement for the sale of lands, at a time when the seller had no control over them, is not such a part performance of the agreement as will take it out of the operation of the statute of frauds; and neither is the building of a mill on other lands of the purchaser, where the agreement merely provides that if the mill is built the price of the lands will be less: *Osborn v. Phelps*, 48 Am. Dec. 133. An act done by one party to a contract, which is rightfully treated by the other as a trespass, cannot, by a subsequent understanding, be made a sufficient part performance to take the case out of the statute: *Baker v. Cuyler*, 12 Barb. 667. Where a vendor verbally agrees to convey a tract of land, receives a valuable consideration, admits the contract, and avers a readiness to convey, the case is thereby taken out of the statute of frauds: *Bennett v. Tiernay*, 78 Ky. 580. A verbal agreement to execute a mortgage to secure moneys advanced to enable the promisor to purchase the land is void by the statute of frauds, and advancing the money is not such part performance as will take the case out of the statute: *Marquat v. Marquat*, 7 How. Pr. 417. The building of a party-wall by the plaintiff under a parol agreement with the defendant that he would pay for one half of as much of the wall as he used, when he built, is such a part performance of the contract as takes it out of the statute of frauds: *Rawson v. Bell*, 46 Ga. 19. A parol agreement by a mortgagee to release the mortgagor from his personal liability, if he will convey the lands to a third person, may be enforced by the mortgagor, after performance on his part: *Coyle v. Davis*, 20 Wis. 564; *McClellan v. Sanford*, 26 Id. 595. Where one furnishing men to fill the quotas of certain towns, under a call of the president, at the request of the provost-marshal, deposited with him county bonds, under a parol agreement that they should be held as security at

the rate of five hundred and fifty dollars per man, that the men then and thereafter to be furnished by him should not desert before reaching the place of rendezvous, it was decided that this agreement was void under the statute of frauds, and that the delivery of the bonds did not constitute such a part performance as to take the case out of the statute: *Richard v. Crandall*, 48 N. Y. 348. Entering upon land and cutting timber is not possession so as to constitute part performance of a contract of sale: *Baring v. Peirce*, 40 Am. Dec. 534. Choosing a person to divide the property, taking part in the division, delivering possession of the property set off, and permitting the other party to lease the land, receive rents and profits, and pay taxes thereon, are such acts of part performance as will avoid the statute of frauds: *Weed v. Terry*, 45 Id. 257.

THE PRINCIPAL CASE IS CITED in *Taylor v. Henderson*, 38 Pa. St. 61, to the point that a parol contract for the exchange of lands must be proved by competent evidence. It cannot be inferred merely from the declarations of one of the parties; and in *Fussell v. Rhodes*, 2 Phila. 167, to the point that a parol contract for the sale of lands, to be binding, requires a sufficient consideration, and to avoid the operation of the statute of frauds there must be absolute possession taken under it.

DAVIS v. STEINER.

[14 PENNSYLVANIA STATE, 275.]

DEMURRER TO EVIDENCE ADMITS ALL FACTS that the evidence conduces to prove, though but in the slightest degree, or that the jury might, with the least degree of propriety, have inferred from it, and no testimony can be considered which impugns the truth of such facts.

ANY ADVANTAGE TO ONE PARTY OR DETRIMENT TO THE OTHER, however small, is a sufficient consideration to support a promise.

ACKNOWLEDGMENT TO TAKE CASE OUT OF STATUTE OF LIMITATIONS need not refer to the amount of the debt, but there must be no uncertainty in it as to the debt referred to.

CASE brought by David Davis against Steiner, executor of Philip Kuhns, deceased. The facts are sufficiently stated in the opinion.

Foster, for the plaintiff in error.

Cowan, for the defendant in error.

By Court, ROGERS, J. On a demurrer to evidence, the party demurring admits all the facts which the evidence tends or conduces to prove, though but in the slightest degree or which the jury might, with the least degree of propriety, have inferred from it. Every fact is taken against the party demurring as true, and no testimony can be considered which impugns its truth: *Feay v. Decamp*, 15 Serg. & R. 231; *Crawford v. Jackson*, 1 Rawle, 431; *McKinley v. McGregor*, 3 Whart. 376; *Duerhagen*

v. *United States Ins. Co.*, 2 Serg. & R. 185. The court is not by the demurrer substituted for the jury, whose duty it is to weigh the testimony, but the case must be ruled on the evidence adduced, in strict subordination to the rule stated.

The evidence proves, or which is the same thing, tends or conduces to prove, this state of facts: On the fifth of March, 1819, plaintiff sold, by articles of agreement, a tract of land to Jacob Dry, for two thousand five hundred dollars, and received one thousand dollars in part payment of the purchase-money. About the time of sale, judgments were entered against the vendor, the plaintiff, for about six hundred dollars. On one of the judgments, execution issued, and the vendor's interest in the land was levied on. After the first contract, but before the sheriff's sale, an agreement was entered into between the plaintiff, Philip Kuhns' defendant's testate, who was his brother-in-law, and the purchaser, Jacob Dry. Kuhns was to bid off the land at the sheriff's sale, and take a deed in his own name. He was to pay the judgment against Davis, and to receive from Dry the unpaid purchase-money as it became due, and to make Dry a deed, in pursuance of the original contract. After being reimbursed the money advanced, it was agreed that the residue should be paid by Kuhns to Davis. In pursuance of the contract, the money remaining due was regularly paid to Kuhns, the last payment in 1827, when Kuhns executed a deed to Dry. The suit was brought on the twenty-second of January, 1848, to recover the amount which Kuhns received over what he paid to the sheriff. Jacob Dry, one of the contracting parties, whose testimony, as we have seen, must be taken to be true, furnishes abundant proof of the contract as above stated; at least, it cannot with any plausibility be denied that it tends or conduces to prove it; nor can it be alleged there would have been the least degree of impropriety in the jury inferring the contract from his evidence alone. His statement derives strength from the relationship between the parties, and in addition, it is corroborated by repeated confessions of Kuhns, as detailed in the evidence of all the other witnesses who were examined.

From the whole testimony, the result is plain that the jury not only might, but were bound to believe there was a contract between the parties, such as is alleged by the plaintiff. It must be remarked that it is not pretended by the defendant that he performed the contract, by the payment of a single dollar to Davis, although he concedes he received all the purchase-money, and does not deny that he only paid, at the sher-

iff's sale, one thousand and fifty dollars. Conceding these facts, the amount of indebtedness may be readily ascertained. It clearly is the difference between the amount received from Dry and the money paid at the sheriff's sale, with interest to be calculated according to the contract. This is plain, but some difficulty has arisen as to the money for which Davis gave his receipt to the sheriff. The plaintiff alleges he never received any money whatever, except the one thousand dollars which was first paid; that the whole was received by Kuhns; that he receipted the docket, as it is expressed, merely for the purpose of enabling Kuhns to make a deed. If that be so, then Kuhns only paid for Davis the amount of the judgment, for which alone he is entitled to credit. This, however, we do not undertake to decide, as the whole matter of indebtedness will be investigated before the inquest, to which it is our purpose to refer it.

But, admitting the contract, the defendants contend they are not liable, because there was no consideration; and that the action is barred by the statute of limitations.

As to the question of consideration, Dry testifies that he intended, but for the contract, to purchase the property at the sheriff's sale. If so, he would have been bound to perform his contract with Davis, by payment of the purchase-money. It was, therefore, depriving Davis of an advantage which he would otherwise have had, which is a sufficient consideration to support a contract. Any advantage to one or detriment to the other, however small, as has been repeatedly held, is a sufficient consideration to support a promise.

Next, as to the statute of limitations. This mainly depends on the testimony of John and Joseph Davis. Joseph Davis testifies in this wise: "My father sent me in from Mercer county to ask Kuhns for money that he claimed. This was in 1844. He said he had no money, and could not make any money. I said I would take a good horse. He said he could not spare any; said he must do for his own children before he could do anything for my father." The witness further said: "I was talking to him about the money my father claimed on the Dry farm."

It must be remarked that the claim is not made as a favor, but as a debt to which his father is justly entitled, for that is the fair import of the testimony; and yet the defendant's testate does not venture to deny the claim, but alleges, as an excuse for not paying, that he had no money, nor horse to spare;

that he must do for his own children before he could do anything for the father of the witness. Although this would raise a suspicion in the minds of a jury that a debt was due, which he was ashamed to deny, yet I acknowledge the case could not be safely rested on this testimony alone. The acknowledgment is not so clear and unequivocal as the law requires; but in connection with the testimony of John W. Davis, but little doubt can rest upon it. He proves a clear, distinct, unqualified acknowledgment of the debt. He says: "I used to live in the neighborhood of Philip Kuhns. In 1844 I was on the road to Grapeville; caught up with Philip Kuhns. He said he owed David Davis some money, and his son was in after it, and he was coming to Greensburgh to make arrangements to pay the money." If this was not an unequivocal acknowledgment of a debt, there is no force in language; and that it was the money claimed on the Dry farm, now in dispute, explicitly appears from the testimony of Joseph Davis, who says they were talking about the money claimed on the Dry farm. In truth, it must have referred to that debt, as, so far as appears, there were no other pecuniary transactions between them, much less was there any other demand by Davis against Kuhns; nor was it likely there should have been, as Kuhns was sick, and Davis thriftless and poor. The testimony, it must be recollected, must be taken as true; so that all that remains is to ascertain the amount due, which may readily be done from other testimony, which has been already adverted to. There is, therefore, nothing in the plea of the statute; for whatever opinions may have been erroneously entertained heretofore, it is now settled that, to take a case out of the statute of limitations, it is not necessary the acknowledgment should refer to the amount of the debt. It is only necessary there should be no uncertainty in the acknowledgment as to the debt referred to. This is ruled in *Hazlebaker v. Reeves*, 12 Pa. St. 264, and in *Reader v. Grim*, 10 Am. Law Jour. 65.

Judgment reversed, and judgment for plaintiff. Writ of inquiry of damages awarded, and record remitted.

DEMURRER TO EVIDENCE, WHAT ADMITS: See *Mackinley v. McGregor*, 31 Am. Dec. 522, note 535.

LOSS TO PROMISER OR BENEFIT TO PROMISOR IS SUFFICIENT CONSIDERATION: *Adams v. Wilson*, 45 Am. Dec. 240, note 242, where other cases are collected.

ACKNOWLEDGMENT TO TAKE CASE OUT OF STATUTE OF LIMITATIONS: See *Martin v. Broach*, 50 Am. Dec. 306, note 317; *McClanney v. McClanney*, 49 Id. 738, note 742, where other cases are collected.

EICHAR v. KISTLER.

[14 PENNSYLVANIA STATE, 282.]

IN ACTION BY FATHER FOR LOSS OF DAUGHTER'S SERVICES, defendant's marriage with her, after the birth of the child, is not a bar to the recovery of exemplary damages, but may be given in evidence in mitigation of damages.

ACQUITTAL OF DEFENDANT ON INDICTMENT FOR SEDUCTION, on the ground of his subsequent marriage with the person seduced, does not affect a civil action brought against him by her father to recover damages for loss of her services by reason of the seduction.

ACTION brought by Kistler against Eichar to recover for the loss of his daughter's services by reason of her seduction by the defendant. After plaintiff's daughter gave birth to the child, the defendant went to her father's house and married her; but immediately after the ceremony went away and left her, without returning. The following year he was indicted for seduction, fornication, and bastardy, but was acquitted of the seduction, and sentenced for the fornication and bastardy. The court below charged the jury that the marriage only went in mitigation of damages, and that the criminal prosecution did not affect the civil remedy. Verdict for the plaintiff. Other facts appear from the opinion.

By Court, BELL, J. In this court a question is made whether a father can recover, in this form of action, for the lost services of a debauched daughter, which might have been rendered after her marriage with the seducer. As the action is technically *per quod servitium amisit*, the suggested doubt would seem to be well worthy of consideration; and were the point properly presented, it would call for a distinct determination, notwithstanding the real injury to be avenged is not the result of merely pecuniary loss, but flows from the wrongs inflicted upon the plaintiff's social position, and the violence done to his peace as a parent and his honor as a man. But it is apparent from the record that this question was not so raised on the trial as to demand of the trying tribunal an expression of opinion, or to justify us in pronouncing any which might affect the rights guaranteed by the verdict. It is said to be fairly offered for discussion by the exception taken to the admission of evidence. This cannot be. When the evidence excepted to was offered, there was no proof the plaintiff's daughter had ever been married. Nay, there was not even a suggestion of this fact; a fact, no doubt, sedulously excluded by the counsel as forming part of the defense, and which could not be intro-

duced incidentally, or upon cross-examination, against the assent of the plaintiff. Probably, from the form assumed by the exception, an effort was then made to bring the marriage to the notice of the court; but as the progress of the plaintiff's case could not be suspended for such a purpose, it necessarily failed. Accordingly, we find that immediately after the defense was opened, the defendant recalled the same witness to establish the marriage of his sister in November, 1847. Up to this moment it could not have been judicially known to the court, and of course, a prior ruling of a controverted point of evidence could not, by possibility, have turned upon it. How, then, stood the case when the objection to evidence was offered? The witness was testifying to the domestic habits of his sister before her pregnancy and confinement. He had said she used to assist her mother in the necessary work of the house, and added: "I don't know how long she was confined to her bed, but she is not healthy over since." Then follows the memorandum, for it is nothing more: "Evidence since marriage objected to." Evidence of what? Whose marriage? To neither of these questions does the record, up to this point, furnish an answer. How, then, could the court be called upon to determine, at that moment, what would be the legal effect of the daughter's marriage upon the father's rights? It is obvious no such inquiry could then be propounded to it; and it is equally obvious the court did not, as it regularly could not, assume to answer if the query were then presented. Had the defendant wished the instruction of the court upon this head, it was very easy to procure it by submitting the proper request. But although he furnished points upon which he prayed a direction to the jury, he wholly omitted to call attention to the question he now attempts to make. He was probably influenced to this omission by the conviction that, whatever might be the answer returned, it would, under the developed facts, affect but little, if at all, the final result. Under the circumstances, we should hazard injustice, both to the party and to the learned president of the common pleas, by entertaining the inquiry pressed upon us.

The idea advanced by the second of the defendant's points is certainly a novel one; at least to me. It assumes that the marriage of a debauched daughter with her seducer must be accepted in all cases as a full atonement for the mental anguish endured by the parent; for the insult offered to his honorable feelings; for the deep distress which may overwhelm the family circle because of the indelible disgrace inflicted upon one of

its members; and for the irretrievable loss of social position. Marriage, though tardy, may, in many instances, alleviate these wrongs, but it cannot, in any, entirely compensate them. Marriage may, therefore, be reasonably offered as a fact which ought to mitigate the damages to be recovered; and so the judge told the jury in this case. But the proposition is, that it ought to be accepted as a complete bar to the recovery of any sum beyond the mere pecuniary value of the actual service lost by the parent. This position is certainly somewhat startling, especially when it is recollected that, in a large majority of the cases where a galling sense of wrong has overborne the natural reluctance to offer private distress to the publicity of judicial investigation, the loss of service is a mere fiction, the toleration of which sheer necessity has wrung from the obduracy of the ancient common law. That necessity sprung, not from the propriety of reimbursing an abstracted profit, but from the conviction that private happiness and public order alike demanded at the hands of the law some protection of the sanctities of home against the desolating intrusion of lawless passion. None of the numerous cases of this description with which our books abound offer a recognition of the supposed principle invoked by the defendant. Did it exist, the instance before us would offer a strong illustration of its injustice. The evidence indicates that the seeming reparation offered by the defendant was suggested by no penitent desire to atone for the past, but was embraced as a means of escaping from the legal consequences attendant upon the wrong inflicted. The events which followed the marriage proved it to have been an accumulation of injury; if, indeed, it were not so intended. How, consistently with reason, such a marriage can be set up as a bar to the recovery of exemplary damages, I am at a loss to perceive. I do not say what followed immediately upon it ought to be received as a legitimate cause for swelling the damages, but certainly may very properly be considered in weighing the question whether the marriage itself ought to be accepted in mitigation. To assert otherwise would be to ascribe to a new insult the singular power of obliterating the old.

The views expressed by the court of common pleas as to the legal effect of the act of 1843, and the indictment framed under it, upon the rights and remedies of the plaintiff in this action, are well founded. The legislature, when creating a new crime, had no intent to interfere with an existing civil remedy. Each is entirely independent of the other. In fact,

the criminal offense requires the ingredient of a promise to marry, which does not necessarily enter into the civil injury. The defendant was acquitted under the indictment, solely because he had redeemed this promise. It would be singular, indeed, if the mere fact of having been indicted and acquitted should also relieve him from the penalties of a private wrong not involving the element to which he owed his escape from the public prosecution. Besides, the object of one proceeding is to vindicate the public peace and dignity; of the other, to avenge an individual injury by the infliction of heavy pecuniary damages. They may, therefore, well stand together. If not, why should not the statutory indictment for fornication—an offense also founded in seduction—operate to destroy the private remedy?—an effect I have never heard attributed to it. But as this point was very faintly urged, it is unnecessary to labor it.

The cause seems to have been fairly tried, and the questions of law presented correctly determined. If the defendant has been severely dealt with, he must ascribe it to the peculiarities of his case; there is no room to visit it upon the conduct of the judge.

Judgment affirmed.

DEFENSES TO ACTION FOR SEDUCTION: See note to *Weaver v. Bachert*, 44 Am. Dec. 171, where this subject is discussed.

THE PRINCIPAL CASE IS CITED in *Phelan v. Kenderdine*, 20 Pa. St. 361, to the point that the marriage of plaintiff's daughter to the defendant, after the birth of the child, although no bar to exemplary damages in an action for seduction, is nevertheless a circumstance which may mitigate them.

IN RE GANGWERE'S ESTATE.

[14 PENNSYLVANIA STATE, 417.]

WHERE MARRIAGE CONTRACT IS SET UP TO DEFEAT WIDOW'S RIGHT OF DOWER, its existence and contents must be clearly proved.

WHERE MARRIAGE CONTRACT IS ENTERED INTO FOR PURPOSE OF QUIETING CHILDREN of the intending husband, with the promise on his part that when this design was answered it should be canceled, the husband's taking the contract from the trustee, and with his wife declaring at the time that it should be null and void, may be regarded as equivalent to a cancellation thereof, and the fact that it was not actually canceled until some years after is not material, where it appears to have been preserved for the purpose of avoiding unpleasant scenes in the family.

ACTUAL DESTRUCTION OF MARRIAGE CONTRACT BY HUSBAND BINDS HIM, and if ratified by the wife, after his death, it is binding on her also.

TESTIMONY OF WITNESSES WHO SWEAR POSITIVELY, AND ARE OTHERWISE UNIMPEACHED, should not be discredited merely because they are related to the party in whose behalf they testify, although this is a circumstance to be weighed in a doubtful case.

INQUISITION OF LUNACY FINDING PERSON TO BE OF UNSOUND MIND, and that he has been in the same state for a specified time prior to the finding, is *prima facie* but not conclusive evidence of the facts therein found. The petitioner in such proceeding is not estopped from asserting the truth against the finding, and showing that the person had lucid intervals.

ACT DONE IN LUCID INTERVAL by one who has been found to be a lunatic is binding on him, when the proof of the lucid interval in which it was done is clear.

WHETHER MARRIAGE CONTRACT EXECUTED ON SUNDAY IS LEGAL, not decided, the court on that question being equally divided.

APPEAL by the heirs of Henry Gangwere, deceased, from a decree of the orphans' court of Lehigh county, directing the acceptants of the real estate of said intestate to enter into recognizances to secure the purpart of his widow, Jacobina Gangwere. The facts are stated in the opinion.

Wright and Davis, for the appellants.

Porter and King, for the appellee.

By Court, ROGERS, J. As the deceased, Henry Gangwere, died intestate, Jacobina Gangwere, his widow, under the intestate laws, is entitled to the one third of the personal absolutely, and the one third of the real estate during life. This is not disputed; and if there was nothing else in the case, the distribution of the estate would be attended with little difficulty. But the heirs of the intestate contend she is not entitled to any portion in the distribution, because, before or at the time of the marriage, the parties entered into a marriage contract. To defeat the widow's right of dower, which is favored by the law, three things must be clearly proven: the existence of the marriage contract, its loss or destruction, and the contents. That a marriage contract was entered into between the parties, we have no reason to doubt, as there is proof of the fact by the witnesses examined on the part of the appellant and appellee. They prove repeated declarations to that effect, not only by Henry Gangwere, but by his wife also. The marriage settlement seems to have been made for the purpose of quieting the minds of the children of the intestate by a former wife, who, as is usual in such cases, made a violent opposition to the second marriage. There is reason to believe that without that no contract would have been made; the marriage would have been suffered to take its usual course. This was the reason

assigned by the husband to his intended wife, and there is some ground to believe it was designed for no other purpose whatever, that it was the understanding when this design was answered, the agreement should be canceled, or that compensation should be made to her, if she survived, by a will afterwards to be made. Hence it is that we find that, after the contract had remained in the possession of Christian F. Beitel, the trustee, a year and a half or more, the old man, as he testifies, came to him and wanted the paper, to destroy it. He was quite out of humor because Mr. Beitel would not give it to him. He told him he must bring his wife along, as he could not give it up without all the parties were present. After some time, the old man and his wife came and demanded the paper again. He gave it to them, and they, at the time he delivered it to them, declared it to be null and void. It was declared null and void, as he says, at the time the witness delivered it. The conversation was in German; the literal translation of the expressions used is, as the witness says, that it shall be given up. This testimony there is nothing to contradict, and coming from a respectable witness, I shall take it to be true. It amounts, in my opinion, to a declaration, by both parties, that the marriage contract should be of no effect between them. That the agreement was not actually destroyed and canceled at the time, evinced by the repeated declarations of the old man and his wife, amounts to but little, if, as I am inclined to believe, the original motive for entering into it was to quiet the fears of the children, who, as the old man said, were howling about his marriage, and would continue to do so if they were led to believe the marriage settlement had been canceled and destroyed. To avoid unpleasant scenes in the family may [have been] and in all probability was the real cause the contract was not actually canceled and destroyed. The provision for the wife, according to the representations of the witnesses, was so inadequate that we can with difficulty believe she would have submitted to it, or that he would have been so ungenerous and unreasonable as to exact it, unless there was an understanding it should be considered as of no efficacy, or that a will should be made making up to her any deficiency in the marriage settlement. If, then, the instrument was delivered up by the trustee to the parties, at their request, and at the time of delivery they declared it should be null and void, or words of equivalent import were used, as that it shall be given up, that would be perhaps equivalent to a cancellation or de-

struction of the paper itself. The intention of the parties alone is to be considered; not the mode adopted to signify that intent. *Campbell's Estate*, 7 Pa. St. 101 [47 Am. Dec. 503], is to this point. It is said that the trustee had no right to deliver up the paper to be canceled, and that the assent of the wife does not bind her. That both must be bound or neither. But not so, if, although she is not bound, the husband is. As the wife, since his death, has ratified the acts of the parties, there is no objection on that account. The intention of the alleged article of agreement was (according to the testimony) to limit the rights of the *feme*. C. F. Beitel was named as trustee. There is no positive evidence that the paper was under seal, and it may be the delivery or surrender of such a paper to be canceled is, in equity, to be considered equal to a cancellation. But whether this was such a delivery of possession as amounts to a cancellation of the paper, without more, according to the case of *Cross v. Powell*, Cro. Eliz. 483, recognized in *Campbell's Estate*, 7 Pa. St. 101 [47 Am. Dec. 503], it is unnecessary to consider, as it is agreed that if it was delivered up to be canceled, and was canceled, the instrument cannot be enforced as a valid settlement. Whether it was canceled or destroyed, will be examined in another part of this opinion.

As has been before said, it is necessary for the sons to prove the existence of the paper, its destruction, and afterwards its contents. That such a paper existed at one time, has been fully proved; it is also equally certain it has been destroyed; and the next question is, Have the contents of the paper been legally proved? On this point, the law is well settled; the rule is, that the contents of a lost paper must be so proved as that the court can say, with something approximating to certainty, what it contains. When a party has failed to prove the terms of the agreement he relies on, equity will not assist him, by directing an issue to ascertain the terms. If he be plaintiff, it is incumbent on him to state in his bill the agreement of which he calls on the court to decree performance, and to prove the agreement as stated: *Savage v. Carroll*, 2 Ball & B. 451; *Ormond v. Anderson*, Id. 368.

Equity will not decree the specific execution of a contract the terms of which are uncertain as to its extent: *Harnet v. Yielding*, 2 Sch. & Lef. 549. And again, equity will not decree the specific execution of articles of agreement, when they appear to be unreasonable or founded on fraud: *Young v. Clerk*, Prec. Ch. 538.

In addition to the authorities cited, it may be added that

chancery will not decree specific performance, without proof of the whole contents of the instrument. Evidence of part will not suffice, and particularly a marriage contract, where the words used by the parties, see *Ellmaker's Estate*, 4 Watts, 89, are so important as regards the rights of the *feme*. In this case, proof of the contents is singularly meager and uncertain. There is not a single witness who undertakes to give the whole contents of the contract. What sum she was to receive, whether one hundred, one hundred and twenty-five, two hundred, or three hundred dollars, we are not informed; whether that sum was in gross, or to be paid to her annually, we know not; nor do we know (which is very important to her rights) what she relinquished in consideration of the settlement, whether her right to dower, her right to the personalty in case of intestacy, or her right to both. On these important matters, we are left entirely in the dark. There is nothing proven on which equity could found a decree. But, notwithstanding this radical defect in the appellant's proof, I grant that if they have shown that the marriage contract was fraudulently destroyed by the appellee herself, equity will not make any intendment against him. Equity will not brook that a party shall take advantage of his own wrong. And this leads to the inquiry as to the loss of the paper, and the persons by whom it was destroyed. That the contract is not now in existence seems to be put beyond all doubt. Indeed, this seems to be taken as a conceded fact by both parties. But, although destroyed, the appellants allege it was fraudulently destroyed by the appellee or by her connivance; that although it may have been in the presence of her husband, and with his assent, he was in such a condition of mental imbecility as to be incapable of giving any validity to it. The allegation of the appellants, it is vain to deny, amounts to a direct charge of perjury against two witnesses, and of combination and fraud between these witnesses and the appellee. To sustain such a charge requires clear and stringent proof. The witnesses to whom I allude are Catherine Phleuger and David Young, who prove that the paper was actually destroyed by Henry Gangwere himself. The old woman refused to destroy it, and then, as the witnesses say, he put it in the stove and burned it himself. That this was the marriage contract, we have no reason to doubt. It was said by one of them, but which the witness does not recollect, it was the writing they had with each other; and it is very certain they had no contract except the marriage

contract. Catherine Phleuger testifies, the old man said the paper (referring to the paper burned) was the agreement they had made together when they were married. I do not lay much stress on the fact that Catherine Phleuger was mistaken, admitting she was so, in the time this transaction took place. There is nothing so difficult to recollect, and in which witnesses are so liable to mistake as in dates, and to stamp them with the charge of perjury for that reason would be most perilous. If we suppose the transaction to which the witness testifies took place after the time the money was counted, there is next to nothing to throw a shade of suspicion on the evidence given by those witnesses. We should not be warranted in disbelieving them merely because of their connection with the appellee, one being married to her son, the other to her granddaughter. These are circumstances to be weighed in a doubtful case, but ought not to be allowed to shake our credit altogether in witnesses who swear positively to the fact and are otherwise unimpeached.

Taking it, then, for granted that the contract was destroyed in the manner described by them, the next inquiry is, Was Henry Gangwere in a condition to assent to its destruction? It is alleged that at the time he was a lunatic. In proof of this, the appellants rely on a petition or commission of lunacy, which was presented at the May term, 1847, the inquisition held the tenth of May, 1847, finding him of unsound mind, etc.; and that he hath been in the same state for the term of one year last past and upwards. This, it will be observed, overreaches the time testified to, when the contract was destroyed. The petition, it appears, was presented by the appellee, and she was examined as a witness. Some of the jurors have testified as to what she swore on that occasion. As was natural to expect, they have given entirely different versions of it. This, coupled with the fact that he was very much alarmed and confused, will prevent me from paying much attention to this part of the evidence, except in stating that it rather tends to show that he was not entirely bereft of understanding; it evinces—what is very important in this inquiry—that he had lucid intervals. Great reliance is placed on the fact that the commission of lunacy overreaches the time of the alleged burning of the will. This undoubtedly is entitled to great weight; but it is well settled that instruments executed or acts done by a lunatic in a lucid interval are binding, even if afterwards overreached. It is *prima facie*, but not conclusive evidence, as is ruled in *Hutchinson v. Sandt*, 4 Rawle, 234 [26 Am. Dec.

127]; *Rogers v. Walker*, 6 Pa. St. 373 [47 Am. Dec. 470]; *Sergeon v. Sealey*, 2 Atk. 412, 413; 1 Coll. Lun. 389, secs. 1-3. The inquisition in this case was no more binding on Mrs. Gangwere, although a petitioner and witness, than on a stranger. She is not estopped from asserting the truth, as is in effect ruled in *Hutchinson v. Sandt*, 4 Rawle, 234 [26 Am. Dec. 127], where it is held that one of the inquest himself was not estopped. It was ruled to be persuasive evidence only. The testimony adduced on both sides, whilst it shows clearly a general imbecility of mind, also as clearly proves that Henry Gangwere had lucid intervals. The evidence on that point is irresistible. In addition to the whole current of the evidence, the testimony of Jacob Correll and Wittman, who testify as to what took place the twenty-sixth of September, 1846, when they went to count the old man's money, is conclusive: "We talked very little to him; but what we talked to him he answered correctly. When we counted the money, the witness saw nothing wrong in him. He was in a low, weak state. What little questions we put to him he answered sensibly. He was sitting up. He directed me where to find the money in his tenant's house. He told us there was a small trunk in a chest in the garret, in his tenant's house. That there was about twelve hundred dollars there. We went and got it, and found it there, and counted it, and it overrun a little, ten, twelve, or fourteen dollars." Mr. Wittman says when they counted the money the old man was sensible, very sensible. "I had a conversation with the old man. He told me things about my uncle, which I knew to be true. He talked about his younger days."

If this testimony is to be taken as true, and there is no reason to doubt it, the old man had the possession of his mental faculties at that time. Any act of his then would have been good, notwithstanding the commission. The proof of a lucid interval would be most clear. This, be it observed, was about the time specified by Catherine Phleuger and David Young, when the contract was burned. Catherine Phleuger, after giving a clear statement of what was said and done by the old man and his wife, says: "What he talked to me, he talked understandingly." David Young, in answer to a question put to him, says: "He had his understanding, as much as I could see. He talked like a man having his understanding as he had done before we knew there was anything out of the way with him." From the testimony taken together, the evidence is clear that at times, although his understanding had been im-

paired by age, and considerable imbecility of mind existed, yet he had lucid intervals, and it is proved by two witnesses that when the contract was destroyed, it was destroyed by himself, in pursuance of a resolution long before taken, and prevented from being carried into effect by the delicacy of his wife; and that, at the time he had an understanding sufficiently clear to enable him to do any valid act in the disposition of his property, and particularly in relation to an obligation or act of duty which he conceived himself bound in conscience to perform.

I am unwilling to believe that the old lady, who has shown, as is proved, singular integrity and delicacy of mind and sense of propriety, in relation to her husband and his children, should have been guilty of subornation of perjury and wicked combination to cheat and defraud. At any rate, the testimony is not so clear as to justify us in putting a decision on a point on which this must be assumed as its groundwork. It is impossible to rule this case in favor of the appellants on any other hypothesis.

It will be remarked that this decision goes on the assumption that the marriage contract was legal, though executed on Sunday. The court gives no opinion on that point, because, being equally divided, we were unable to come to any conclusion on this part of the case.

Decree of the orphans' court affirmed.

INQUISITION OF LUNACY, EFFECT OF, AS EVIDENCE: See *Rogers v. Walker*, 47 Am. Dec. 470, note 474, where other cases are collected. The principal case is cited in *Imhoff v. Witmer's Adm'r*, 31 Pa. St. 245; in *Tillow v. Tillow*, 54 Id. 224, and in *Klohs v. Klohs*, 61 Id. 247, to the point that an inquisition of lunacy and the decree upon it are only *prima facie* evidence of incapacity.

SUNDAY, JUDICIAL ACTS DONE ON: See *Davis v. Fish*, 48 Am. Dec. 387, note 392, where other cases are collected.

CONTRACTS MADE ON SUNDAY: See *Adams v. Hamell*, 43 Am. Dec. 455, note 457, where other cases are collected.

FACT THAT WITNESS IS RELATED TO EITHER PARTY TO ACTION does not necessarily affix a legal discredit to his testimony: *Potts v. House*, 50 Am. Dec. 329; *Groves v. Steel*, 46 Id. 551.

PENNOCK'S APPEAL.

[14 PENNSYLVANIA STATE, 443.]

EMPLOYMENT OF PUFFER AT SALE OF REAL ESTATE under an order of the orphans' court is a fraud on the purchaser, which, at his option, invalidates the sale.

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ONE OF SEVERAL ADMINISTRATORS MAY PURCHASE AT SALE of real estate made by them, subject, however, to the power of disaffirmance in the heirs or creditors. But the other bidders at the sale cannot disaffirm the sale to such administrator, and a bid made by him may be *bona fide*.

APPEAL from the decree of the orphans' court of Delaware county. The appellants, at a sale by the administrators of Abram Powell, deceased, purchased two tracts of land designated by the letters A and C, for the former of which they bid four thousand dollars, and for the latter three thousand dollars. One of the written conditions of sale was, that the highest and best bidder should be the buyer, and the crier testified that he proclaimed at the outset that the sale would be a fair one. One Hibberd, guardian of the minor children of Abram Powell, deceased, testified as follows: "My bids were to help the property up to the price we wanted for it. It was knocked off at four thousand dollars." This testimony was in reference to the tract designated by the letter A. In reference to the tract designated by the letter C, Elizabeth Powell, one of the administrators, testified that she authorized Joseph Powell to bid on that up to a certain amount, and that she intended to take the property if it had been struck off to him. The appellants filed exceptions to the confirmation of the sales of both tracts. The orphans' court dismissed the exceptions, and confirmed the sales. Other facts appear from the opinion.

E. Darlington and Lewis, for the appellants.

Broomall and W. Darlington, for the appellee.

By Court, GIBSON, C. J. It is impossible to doubt the principle of the civil law adopted by Lord Mansfield in *Bexwell v. Christie*, 1 Cowp. 395. Good faith is an indispensable ingredient of fair dealing; and it is impossible to imagine a purpose, consistent with it, for which sham bidding is necessarily employed. The vendor may prescribe conditions of sale which will enable him to retain the property should it not come up to his price; and if he do not produce the effect openly, why should he do it covertly? Common honesty requires that all should be fair and above board. To screw up the price, as it has been aptly termed, by secret machinery can be no less than a fraud; and a sham bidder can be used for no other purpose. The decisions on the subject have fluctuated; but the largest license allowed in any of them has been to employ a single puffer; yet, whether there be one or whether there be twenty, the mischief is the same, except as to the degree of it. It has

been said that the employment of a plurality discloses too clearly to be mistaken, not a design to protect the property from being sacrificed, but to give an artificial impulse to the sale of it. That touches the honesty of the vendor's motive; but what have the bidders to do with it? Should he actually think that not less than twenty could protect it, the sale would still be, according to all the cases, fraudulent and void. It is not his motive, but his acts, by which they are affected; and these present a question, not of actual, but of legal, fraud. In a treaty for a private sale, the vendor may praise his property without stint, because his interest in the price of it is so obvious as to put the vendee on his guard, who consequently purchases, not on the faith of the vendor's representation of its value, but on his own judgment; but in a public sale, especially of land, which has no standard of value in the market, he is necessarily influenced by the bids of those whose interest it is to get the property at the smallest price. Timid bidders are emboldened by decided ones; and to employ a decoy duck to inspire them with false confidence is grossly immoral. The very excitement of competition has its influence, and it is unfair to increase it by introducing a man of straw.

It is wonderful how slowly the most obvious truths are perceived and admitted. The plain and simple morality of the gospel required a revelation. Even in my day at the bar it was the constant practice of the orphans' courts to allow a charge in administration accounts for the price of strong drink, furnished avowedly to stimulate the bidders at the sale of the decedent's effects.

The weight of authority is now, as it was at first, in favor of the true principle. Whatever may have been the state of the balance when Mr. Sugden collected the cases in his treatise on vendors, his own opinion evidently coincided with that of Lord Mansfield; and Chancellor Kent expressly adhered to it. Against *Bramley v. Alt*, 3 Ves. 620; *Conolly v. Parsons*, Id. 625, n.; *Smith v. Clarke*, 12 Id. 477; and *Steele v. Ellmaker*, 11 Serg. & R. 86; we have in addition to *Bezwel v. Christie*, 1 Cowp. 395, and *Howard v. Castle*, 6 T. R. 642, the modern cases of *Crowder v. Austin*, 2 Car. & P. 208; *Wheeler v. Collier*, 1 Moo. & M. 123; *Thornett v. Haines*, 15 Mee. & W. 866; *Meadows v. Tanner*, 5 Madd. 34; and *Veazie v. Williams*, 8 How. 134. After the English judges have overruled three of their decisions to restore the principle of the civil law, we ought not to be tenacious of our single one. I concurred in

the decision of *Steele v. Ellmaker*, *supra*, exclusively on the foundation of precedent; but the balance of authority is conclusively the other way, and that case has neither principle nor precedent to support it. Chief Justice Tilghman did not doubt Lord Mansfield's decision—he said that none of the courts had gone so far as to affirm that it is not law—but he doubted whether the rule of the civil law was not too severe to be applied to the transactions of business. The duties and obligations of the civilians are often too nice for modern use; but this is not one of them. The rule is exactly defined; and it may be practically applied, without let or hinderance, to every case without exception.

The objection to the sale of the tract designated as letter C is not sustained. The bills alleged to have been spurious on it were made by an agent of the widow, who, though an administratrix, had a right to purchase, subject to the power of disaffirmance in the heirs or creditors. The other bidders had no right to disaffirm her act; and her bids, made through her agent, were in good faith. The argument would have been more plausible had she been utterly incapacitated; but as a sale to her would have been but voidable and probably confirmed, there is no room to say she was not a *bona fide* bidder.

It is ordered and decreed that the sale of the tract designated by the letter A be set aside; and that the decree of confirmation be affirmed for the residue.

EMPLOYMENT OF PUFFER AT AUCTION SALE INVALIDATES SALE: *Baham v. Bach*, 33 Am. Dec. 561, note 563, where other cases are collected; *Staines v. Shore*, 16 Pa. St. 203, citing the principal case.

ADMINISTRATOR CANNOT PURCHASE PROPERTY OF ESTATE: See *Erskine v. De La Baum*, 49 Am. Dec. 751, note 759, where other cases are collected.

KENSINGTON BANK v. PATTON.

[14 PENNSYLVANIA STATE, 479.]

ACKNOWLEDGMENT TO TAKE CASE OUT OF STATUTE OF LIMITATIONS must contain an unqualified and direct admission of a previous debt, which the party is willing to pay.

PROMISE TO TAKE CASE OUT OF STATUTE OF LIMITATIONS must be a promise to pay on demand, an immediate, unqualified promise to pay, without restriction or conditions. *Per Rogers, J.*

ACTION brought by the Kensington Bank against Robert Patton on a promissory note. The defendant pleaded the statute of limitations. The court below ordered a nonsuit. The other facts are stated in the opinion.

J. Johnston and St. George T. Campbell, for the plaintiff in error.

Hood, for the defendant in error.

By Court, ROGERS, J. Was this a case to be tested exclusively by the earlier decisions, sufficient appears in the evidence to take it out of the operation of the act of limitations. This is conceded; but the later cases have adopted more stringent rules, and have nearly restored the construction of the act to what it ought originally to have been. Being a statute of repose, it deserved encouragement, a benign interpretation, instead of rebuke, censure, and discountenance, carried to such an extent as almost to amount to a repeal of the act itself. Nor do I think that the law will be put upon a proper footing until some legislative action is had, some enactment, similar to the British statute, is introduced into our system requiring the acknowledgment and promise to pay to be in writing. The inquiry now is, How does the case stand on the modern decisions? some of which only is it my intention to notice. In *Bell v. Morrison*, 1 Pet. 351, it was held that plaintiff must show himself entitled to recover on the terms of the new promise; and if any conditions were annexed they ought to be shown to have been performed. The acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay. Expressions equivocal, vague, and indeterminate will not suffice. The statute was designed to guard against persons being entrapped in careless conversations and betrayed by perjuries. The promise to pay must not be vague, shadowy, and uncertain; it must be plain, unambiguous, and express, and such as to preclude hesitation and doubt: *Allison v. James*, 9 Watts, 380; *Gilkyson v. Larue*, 6 Watts & S. 213; *Morgan v. Walton*, 4 Pa. St. 322; *Berghaus v. Calhoun*, 6 Watts, 219. In *Morgan v. Walton*, the words were: "I owe your father, but tell him I cannot pay him this fall, not before next spring; but next spring I intend to settle with your father, and pay him what I owe him, or pay him his account." Held, not to take the case out of the act. Although there was an acknowledgment of the debt, yet it was qualified by what took place at the time.

The words on which plaintiff relies are, that defendant said to an agent of theirs, that he would come up to the bank in the course of a few days, and make some arrangement to pay the note. The witness, who was a clerk in the bank, says he

went to Patton, the defendant, and said there was a note of his for one hundred dollars, which had been lying unpaid, and that he had been sent to have some arrangement made respecting the payment of it. The defendant said he would call up at the bank in the course of a few days, and make some arrangement respecting the payment of it. He said he might pay it, or could pay it, in the course of a year. Something was said by witness of taking five dollars at a time. Witness told him that the bank would take it in any sums he chose. Does not remember whether defendant declined that or not. That this may be considered as the acknowledgment of a debt may be conceded; but is it consistent with a promise to pay? The witness says he would call up and make some arrangement to pay the debt.

In *Oakes v. Mitchell*, 15 Me. 360, the words were: "An arrangement will soon be made to pay the note. I calculate to pay it, and I always calculated to pay it." This was held not sufficient to take the case out of the act of limitations. That case is very like the present. It is also ruled in England that the acknowledgment must be such as plainly to imply a promise to pay, on request or demand, because the promise in the declaration is to pay when thereto requested; or in other words, on demand. Here, if we take the whole conversation together, it was the promise to pay in the course of a year. Thus, in addition to *Oakes v. Mitchell*, and the other cases cited, which decide this case, in *Tanner v. Smart*, 6 Barn. & Cress. 603, Lord Tenterden declared that the acknowledgment must be positive, distinct, and unqualified, and such as to maintain the promises in the declaration, viz., to pay on demand. The acknowledgment and promise in that case were: "I cannot pay the debt at present, but I will pay it as soon as I can." This rule is approved in *Hart v. Prendergast*, 14 Mee. & W. 741, by Pollock, C. J., and barons Parke, Alderson, and Rolfe. In *Hart v. Prendergast*, this latter was held insufficient. I will not fail to meet Mr. H., "the plaintiff, on fair terms, and have now a hope that before perhaps a week from this date, I shall have it in my power to pay him, at all events a portion of the debt, when we shall settle about the liquidation of the balance." In that case, there is an acknowledgment of the debt which, unqualified, would be sufficient; but, inasmuch as it appears he was unwilling to pay except on terms, it failed to take the case out of the operation of the act. So here, although there is an acknowledgment of the

debt, yet it is accompanied by evidence that he was unwilling to pay except in the course of twelve months. He said he might pay, or could pay it, in the course of a year. He said he would call at the bank, in the course of a few days, and make some arrangement respecting the payment of it. It also appears that to a proposition to pay five dollars at a time, no response was made by the defendant; at least none is recollected. It is very true that from an unqualified acknowledgment of the debt, a promise to pay may be inferred; but this presumption may be rebutted by other parts of the conversation, which show that it is not the intention of the defendant to bind himself to pay the debt on demand.

In *Tanner v. Smart*, *supra*, it is true, the words being, "I cannot pay the debt at present, but I will pay it as soon as I can," an intimation is given that if there had been proof of the defendant's ability to pay, the court would have held it sufficient to take it out of the act. That, however, is not the point of the decision, the principle ruled. (I speak for myself alone.) What I take to be the true principle is, that it must be a promise to pay on demand; an immediate, unqualified promise to pay, without restriction or conditions. This construction, I think, policy demands for the security of the unfortunate debtor. Experience shows (and this is a case of that description) that, as soon as an insolvent debtor is beginning to retrieve his affairs, traps are set, and persons employed to betray him into unguarded expressions, which are immediately laid hold of as the foundation of a suit. Hence it is that we have so many cases on our docket of this class. And this will ever be the case, when a state of prosperity succeeds a state of extreme depression and adversity; which latter is unfortunately too often the case among our active, enterprising, and untiring countrymen. A strict interpretation of the act, in my judgment, is better for both creditors and debtors, more particularly in this country, where the creditor of to-day may become the debtor to-morrow. And, although this point, as to construction, is not expressly ruled, yet it comes within the spirit of decisions in this state. Although intimations have been thrown out by judges from time to time, yet the contrary has not been expressly decided.

Judgment affirmed.

ACKNOWLEDGMENT TO TAKE CASE OUT OF STATUTE OF LIMITATIONS: See note to *Davis v. Steiner*, *ante*, p. 547, where other cases are referred to.

CORSON v. HUNT AND ABRAHAMSON.

[14 PENNSYLVANIA STATE, 510.]

WHERE PROPERTY LEVIED ON BY CONSTABLE IS CLAIMED BY STRANGER to the writ, the officer is not bound to proceed further with the execution of his writ; but when he has demanded and accepted such indemnity, he is bound to proceed and rely on his bond for indemnity.

MEASURE OF DAMAGES IN ACTION AGAINST CONSTABLE FOR FALSE RETURN is the value of the property, when such value is not equal to the amount of the debt.

DEFECT IN DECLARATION AMENDABLE BY LEAVE OF COURT is cured by the verdict. And a neglect to allege, in the declaration in an action against a constable for not executing an execution, that the alderman had jurisdiction of the case in which the execution issued, is a defect in form merely, which might have been so amended.

ACTION by Hunt and Abrahamson against Corson for a false return to an execution placed in his hands as constable. The facts are stated in the opinion.

Johnston, for the plaintiff in error.

F. C. Brewster and Goodman, for the defendant in error.

By Court, ROGERS, J. The declaration contains three counts, on two of which at least, the second and third, the plaintiffs are entitled to judgment. The second is for a false return, the third for refusing or neglecting to sell the goods levied on, the constable having accepted an indemnity. It is in full proof that an execution was put into the hands of the defendant, who was a constable, by the justice, and that a short time afterwards he said he had levied, but that some person had claimed the property. A bond of indemnity was then given to him, at his request, which he accepted, expressing himself satisfied therewith. Notwithstanding which, the constable made the following false return: "Returned for want of sufficient indemnification." On this undisputed state of facts, the court ruled that if the jury were satisfied from the evidence that the defendant, after making his levy, demanded indemnity before proceeding to the further execution of his writ, that such indemnity was given to him, with which he was satisfied, he was bound to proceed to sell the goods levied upon in satisfaction of the debt, and his neglect or omission to do so rendered him responsible to the plaintiffs for the amount of the execution, which is the demand in this case. If, as the constable said, property in the goods was claimed by another, he was not bound to proceed unless sufficient indemnity was given; but having demanded and accepted indemnity, the situation

of affairs is entirely altered. He is compelled on his part to proceed to a sale of the goods, and must look to his bond for indemnity. The constable is estopped from showing that the goods belonged to another. As between the plaintiff and the constable, it must be taken to be the property of the defendant in the execution: *Fittler v. Fossard*, 7 Pa. St. 541 [49 Am. Dec. 492]; *Hall v. Galbraith*, 8 Watts, 220; *Miller v. Commonwealth*, 5 Pa. St. 294; *Watmough v. Francis*, 7 Id. 215. So that even admitting what is denied, that the court charged that it was not material whether the property Corson levied on was Sausman's, yet we perceive no error.

It is, however, said the court erred in charging that the plaintiff was entitled to recover to the extent of his demand. That there is an inaccuracy in the language of the judge must be admitted; for the measure of damages is not always the amount of the execution, but the value of the property levied, when it does not equal the amount of the debt. This furnishes the true rule. But the presumption here is that the value of the goods was at least equal to the amount claimed in the execution. That seems not to have been questioned, and if so, no injury was done to the defendant. This court reverses for real, not imaginary or possible, injuries.

The defendant contends the *narr.* is defective in not showing that the alderman has jurisdiction in the case in which he issued execution.

That the *narr.* is so defective as not to stand the test of a general or special demurrer may be admitted; but yet, in Pennsylvania, it is a defect which is cured by verdict. It would be a waste of time to examine the decisions of other courts in other states on questions of amendment. We have a system of our own, depending on our own statutes which have always received a liberal construction. The rule I take to be this, that whenever the defect in the declaration, etc., is such as would be amended in the court before whom the trial is had, it is cured by verdict. The court uniformly considers the error as waived. We consider that as done which might have been done. It will be remarked that the defect here is not that the alderman had no jurisdiction, but that the declaration contains no averment that he had jurisdiction. This is a defect in form, which would have been immediately amended by the court of common pleas, had their attention been called to it.

Judgment affirmed.

OFFICER IS NOT BOUND TO PROCEED IN LEVY OF EXECUTION, where property is claimed by a third person, unless indemnity is given by the plaintiff: *Filler v. Fossard*, 49 Am. Dec. 492.

AMENDMENTS TO PLEADINGS, WHAT ALLOWED: *Cartwright v. Chabert*, 49 Am. Dec. 742, note 747, where other cases are collected. The principal case is cited to the point that whenever the defect in the declaration is such as would be amended in the court before whom the trial is had, it is cured by the verdict in the following cases: *Leckey v. Bloser*, 24 Pa. St. 404; *Huntingdon & B. T. R. R. Co. v. McGovern*, 29 Id. 81; *Lycoming Co. M. I. Co. v. Schollenberger*, 44 Id. 284; *McMicken v. Commonwealth*, 58 Id. 222; *Election Cases*, 65 Id. 39; *Ballard v. Fitch*, 3 Grant Cas. 269.

DE CHASTELLUX v. FAIRCHILD.

[15 PENNSYLVANIA STATE, 18.]

LEGISLATURE HAS NO POWER TO ORDER NEW TRIAL, or to direct the court to order it, either before or after judgment; such power being judicial. LEGISLATIVE, EXECUTIVE, AND JUDICIAL BRANCHES OF GOVERNMENT ARE THOROUGHLY SEPARATED, and within their respective departments equal and co-ordinate.

TRESPASS for cutting and carrying away timber. Verdict for the plaintiff. A motion for a new trial was denied, and judgment was entered upon the verdict. Several intermediate proceedings were had, among which personal property of the defendant was sold on execution, but the proceeds were insufficient to satisfy the judgment. Finally a *venditioni exponas* was issued for the sale of certain realty of the defendant. Thereafter, on the sixteenth of March, 1847, an act of assembly was passed, enacting that a new trial be granted by the court of common pleas, where this action was tried, and directing that the case be proceeded with to trial and judgment in the same manner and with like effect as if it had not been previously tried or motion for a new trial therein denied: Acts of 1847, p. 405. On motion, a rule to show cause why the *venditioni exponas* should not be set aside, and proceedings thereon stayed, was granted. Subsequently, the rule was made absolute. Error was assigned.

IV. *Elwell*, for the plaintiff in error.

IV. *Watkins*, for the defendant in error.

By Court, GIBSON, C. J. If anything is self-evident in the structure of our government, it is that the legislature has no power to order a new trial, or to direct the court to order it, either before or after judgment. The power to order new trials is judicial; but the power of the legislature is not judicial. It

is limited to the making of laws; not to the exposition or execution of them. The functions of the several parts of the government are thoroughly separated, and distinctly assigned to the principal branches of it, the legislative, the executive, and the judiciary, which, within their respective departments, are equal and co-ordinate. Each derives its authority, mediately or immediately, from the people, and each is responsible, mediately or immediately, to the people for the exercise of it. When either shall have usurped the powers of one or both of its fellows, then will have been effected a revolution, not in the form of the government, but in its action. Then will there be a concentration of the powers of the government in a single branch of it, which, whatever may be the form of the constitution, will be despotism—a government of unlimited, irresponsible, and arbitrary rule. It is idle to say the authority of each branch is defined and limited in the constitution, if there be not an independent power able and willing to enforce the limitations. Experience proves that it is thoughtlessly but habitually violated; and the sacrifice of individual right is too remotely connected with the objects and contests of the masses to attract their attention.

From its very position, it is apparent that the conservative power is lodged with the judiciary, which, in the exercise of its undoubted right, is bound to meet every emergency; else causes would not only be decided by the legislature, but sometimes without hearing or evidence. The mischief has not yet come to that, for the legislature has gone no further than to order a rehearing on the merits; but it is not more intolerable in principle to pronounce an arbitrary judgment against a suitor than it is injurious in practice to deprive him of a judgment, which is essentially his property, and to subject him to the vexation, risk, and expense of another contest.

It has become the duty of the court to temporize no longer, but to resist, temperately, though firmly, any invasion of its province, whether great or small.

We are bound to say, therefore, that *Braddees v. Brownfield* is not law, and that it was erroneously decided. As the act before us is null, the plaintiff ought to have been allowed to proceed on his judgment.

Order reversed, and rule to show cause discharged.

LEGISLATURE CANNOT EXERCISE JUDICIAL POWERS: See *Greenough v. Greenough*, 51 Am. Dec. 567, and note collecting prior cases in this series. The principal case is cited on this point in *Ervine's Appeal*, 16 Pa. St. 267; *Shoenberger v. School Directors*, 32 Id. 37; *Menges v. Dentler*, 33 Id. 497; *Grim v.*

Weissenberg School District, 57 Id. 436; *Burn v. Clarion County*, 62 Id. 425; *Richards v. Rote*, 68 Id. 255; *Denny v. Mattoon*, 2 Allen, 379; *Ex parte McCordle*, 7 Wall. 514; *Newland v. Marsh*, 19 Ill. 385; *La. Ice Co. v. State Nat. Bank*, 32 La. Ann. 598.

SEPARATE DEPARTMENTS OF GOVERNMENT interpret constitution for themselves, and are liable only as it provides: See *Hawkins v. Governor*, 33 Am. Dec. 346.

RICKETTS v. UNANGST.

[15 PENNSYLVANIA STATE, 90.]

THERE CAN BE NO PUBLIC SALE WITHOUT BIDDERS OR BY-STANDERS.

EXECUTION SALE AT WHICH ONLY SHERIFF OR SHERIFF AND PLAINTIFF ARE PRESENT, and the property is sold to the plaintiff, transfers no title.

TROVER for the value of certain sheaves of rye alleged to have been converted by Unangst. The rye, which had been the property of one Cunningham, was levied on under an execution on a judgment obtained by plaintiff, Ricketts, against Cunningham. The rye was still growing, and the sale was advertised to take place on the land. On the day of the sale, and before the sheriff started for the place of sale, plaintiff Ricketts offered him a bid for the rye. When the sheriff arrived upon the premises he found no one there, and no one was present at the sale except himself. He went to each field of grain, and called in a loud voice each field at the bids of Ricketts. Then returning to the road opposite one of the fields, he struck down each field of grain to Ricketts at the bids sent by him. The amount bid by Ricketts was applied in satisfaction of his execution, and the sheriff made return that the property was sold to Ricketts. Ricketts did not know that there was no one but the sheriff at the sale, or how the sale had been conducted. There was no evidence of collusion between Ricketts and the sheriff. Afterwards, the same property was levied on, under an execution in favor of another person against Cunningham. Under this sale, the rye was sold to Unangst. When the rye was ripe, Ricketts sent men who cut it. Unangst removed the sheaves. The court below charged the jury that even if they believed that there was no collusion between Ricketts and the sheriff, nevertheless the first sale was illegal, and Ricketts had acquired no property in the rye. Verdict for the defendant; and error assigned.

Comly, for the plaintiffs in error.

Pleasants and Buckalew, for Unangst.

By COURT. There can be no public sale without bidders or by-standers. If there was one bidder, and he not the execution creditor or the controller of the sale, it might make a case of difficulty, because, if the officer got a single bid, the property might be fairly struck down at its value, but not at a bid greatly below its value; but the officer ought not to offer the property before an attendance so thin. It would plainly be his duty to adjourn the bidding to another time; and if he did not, the inference of collusion with the bidder would be so strong that the least spark of evidence of it would invalidate the sale. But the case is infinitely worse when the execution creditor is both buyer and seller. The presumption of collusion is then irresistible and conclusive. We do not say he may not send his bid to the place by the officer; but had he actually attended and bid, without competition, the legal effect would have been the same. Policy requires that such transactions be strictly guarded.

Judgment affirmed.

EXECUTION SALE WITHOUT BIDDERS OR BY-STANDERS, at which plaintiff is purchaser, is constructively fraudulent: See *Martin v. Blight's Heirs*, 20 Am. Dec. 226; *Stockton v. Owings*, 12 Id. 302. The principal case is cited in *McMichael v. McDermott*, 17 Pa. St. 358, to the point that there can be no public sale without bidders or by-standers; and in *Pierce v. Evans*, 61 Id. 420, to the effect that sheriffs' sales must be public and not private, and on the notice required by law.

KASE v. BEST.

[15 PENNSYLVANIA STATE, 101.]

FINAL JUDGMENT, UNTIL REVERSED, BARS SECOND SUIT, though given on insufficient premises and by a justice of the peace.

INTENTION TO GIVE FINAL JUDGMENT being evident, the judgment will be final. The magistrate will not be held to strict form.

THIS was a suit submitted on a case stated by John Best against Simon P. Kase in the court of common pleas. From the case stated, the facts appear as follows: Best, as collector of taxes, instituted an action of debt against Kase for unpaid taxes, before John Horning, a justice of the peace. Before commencing the action, Best's warrant as collector had expired, but an act of assembly had been passed, also before the institution of the action, authorizing collectors to sue for and recover unpaid taxes after their warrants had expired. The justice of the peace, Horning, found that the plaintiff, Best,

had no right to institute suit after his warrant had expired, and concluded his judgment in favor of defendant in the words, "therefore plaintiff for costs." Subsequently, Best began another action for the same taxes before another justice of the peace, William Kitchen, esq., in which the previous judgment of Horning was held to be a bar. Then this proceeding was taken in the common pleas in the nature of an appeal from the judgment of Kitchen. The parties concluded their case stated, with a stipulation that if the court were of the opinion that the proceedings before Justice Horning constituted a good defense to the suit before Kitchen, esq., then judgment should be rendered for the defendant, and *vice versa*. And each party reserved the right to take out a writ of error. Judgment was directed to be entered for the plaintiff; and error was assigned.

Baldy, for the plaintiff in error.

Leidy, for the defendant in error.

By COURT. The entry of the justice was, that it appeared, after hearing, that he had not jurisdiction of the subject-matter: "therefore plaintiff for costs." This is not a formal judgment, but it is certainly a substantive one. As it made an end of the action without discontinuance or *retraxit* by the party, what else can it be? It was clearly the intention to give final judgment for the defendant, and that being evident, the magistrate is not to be held to strict form. There is no such thing, even in our courts of record, where the *ideo consideratum est* never shows its face; and to require even the word "judgment" to appear as a substitute for it on the docket of a magistrate, as it appears on the docket of the common pleas, would produce injustice. He erred in this case in supposing he had not jurisdiction; but his final judgment, though given on insufficient premises, bars a second suit. The defendant's remedy was an appeal; but, as he omitted it from ignorance of the justice's mistake, we are unable to relieve him.

Judgment of the court below reversed, and judgment here for the defendant in the case stated.

JUDGMENT OF COURT HAVING JURISDICTION IS BINDING UNTIL REVERSED: See *Rogers v. Evans*, 52 Am. Dec. 390, and note; *Dunlap v. Glidden*, Id. 625, and note.

INTENTION OF JUSTICE OF PEACE TO GIVE FINAL JUDGMENT being apparent, the judgment will be final: See *Parker v. Swan*, 34 Am. Dec. 619; *Fox v. Hoyt*, 31 Id. 760.

LYCOMING v. UNION.

[15 PENNSYLVANIA STATE, 166.]

STATE LEGISLATURES ARE LIMITED IN REMEDIAL JURISDICTION only by express prohibition, or implication equally imperative flowing from positive provision, or deduced from the nature of the political structure.

BURDEN IS ON ONE SEEKING TO IMPEACH LEGISLATIVE ACTION to show wherein it is unconstitutional.

UNCONSTITUTIONALITY OF LEGISLATIVE ACT MUST BE PALPABLE AND CERTAIN to justify judicial interference.

LEGISLATIVE ACT ENFORCING MORAL OBLIGATION NOT LEGALLY ENFORCEABLE is constitutional.

SERVICE RENDERED TO ONE WITHOUT HIS REQUEST IS SUFFICIENT CONSIDERATION for subsequent promise to pay therefor.

LEGISLATURE MAY PROVIDE REMEDY WHERE RIGHT EXISTS WITHOUT ONE.

AMENDMENT TO CHARTER OF MUNICIPAL CORPORATION takes effect without acceptance by the municipality.

ACT OF TWENTY-SEVENTH OF MARCH, providing that certain counties from which causes have been removed for trial to Union county, by virtue of the act of the thirteenth of April, 1843, reimburse Union county for the expenses of the said trials, is constitutional.

ASSUMPSIT by Union county against Lycoming county, instituted in the common pleas of Lycoming county. The action was brought on a taxation and assessment of costs made by the common pleas of Union county, by virtue of the act of the twenty-seventh of March, 1845, Pamph. Laws, 219. The act of the thirteenth of April, 1843, Pamph. Laws, 235, sec. 9, provided that in all cases where sheriffs' sales of any debtor's real estate were made in several counties, and one or more liens were claimed to exist against the real estate, the court of common pleas where the first sale was made should have jurisdiction to try the issues of fact and to decree distribution of the whole of the funds raised by the sales. John H. Cowden owned real estate in the counties of Northumberland, Lycoming, and Union. This property was all sold under execution by the sheriffs of the respective counties. Some of the liens were disputed, and the fund arising from the sales was brought into court for distribution. The first sale had been made in Union county, and by virtue of the act of the thirteenth of April, 1843, the common pleas of that county had jurisdiction to try issues of fact, and to distribute the fund. This was done. A supplement to the act of the thirteenth of April, 1843, was passed on the twenty-seventh of March, 1845, Pamph. Laws, 219, providing that the due proportion of the expenses incurred by Union county in all causes removed thereto for trial, under the act of the thirteenth of April, 1843, should be reimbursed to

Union county by the counties, in their proper proportion, from which said causes had been removed; and that it should be the duty of the judges of the common pleas of Union county to tax and assess the amount payable by each county. The Union county court assessed the costs, due respectively from the counties of Lycoming and Northumberland, the greater portion of which had accrued prior to the act of the twenty-second of March, 1845, and brought this action. Judgment was rendered for the plaintiff, Union county. Error was assigned on the behalf of the defendant. The plaintiff in error argued that the act of the twenty-seventh of March, 1845, was unconstitutional.

Miller, for the plaintiff in error.

Merrill, for the defendant in error.

By Court, BELL, J. The act of the thirteenth of April, 1843, Pamp. Laws, 235, is a law of general application, though doubtless suggested by the exigencies of a particular litigation, which for some time occupied the courts of this and the adjoining counties. With the power exerted in its enactment the people have been made familiar, by many public statutes authorizing a change of venue in whole classes of cases, and by private acts directing it in particular instances. Though it may have been occasionally misapplied, observation attests the necessity of its existence, and experience proves it is usually called into action by conditions of public policy, or by motives which seek the promotion of private right. Borrowed from the country whence we derive most of our ideas of civil polity and municipal regulations, it has there and here been sanctioned by long usage and confirmed by general approval. Indeed, the ordinary right of the legislature so to interfere with private litigation has never been seriously questioned, and the propriety of its action, in the instance before us, even considered only in reference to the disputes that are supposed to have given birth to the act, is not challenged. Under its provisions, a series of questions, springing from the settlement and distribution of a large estate, situate in the three counties of Lycoming, Northumberland, and Union, have been adjudicated by the courts of the latter county, and thus a wide-spread litigation, which threatened inconveniently to engage the time and attention of three distinct tribunals, at increased costs and trouble, have been concentrated and confined within a single jurisdiction. That the other three counties have enjoyed a large advantage from thus casting the whole work upon Union alone,

her officers and citizens, is not to be denied. Their treasuries have been exempted from the expense necessarily attending these investigations; and their people relieved from the sacrifice of time, business, and money, always consequent upon protracted attendance on courts. That in compensation for this relief, they ought to contribute their proper quota of the costs incurred by Union in doing their work, is dictated by every sense of ordinary justice. Northumberland, it is understood, accedes to this reasonable proposition; but Lycoming refuses, on the ground that the call upon her to do so is unconstitutional.

That the legislature might have made provision by the original act for the payment of costs by each of the counties interested, will not admit of cavil. Ingenuity the most astute, though sharpened by interest, fails to suggest any plausible foundation for such a cavil. We are then reduced to the simple inquiry, whether, after the work is done, the services rendered, and the benefit enjoyed, the legislature may provide for its compensation, and furnish a means for enforcing it. Listening simply to the suggestions of legal propriety, springing from moral obligations founded on valuable services rendered by one to another, there would seem to be room but for an affirmative response. Is there anything in the constitution which may compel a different answer? Regarded in this connection, it is a simple question of power, though greatly modified by considerations of natural equity. In solving it, we must remember that the legislative branch of our government, unlike that of the federal system, is limited in its remedial jurisdiction, only by express prohibition, or implication equally imperative, flowing from positive provision, or deduced from the nature of our political structure. It must be recollected, too, that though it is the duty of our courts, supreme and subordinate, to denounce every invasion of the paramount law, it lies upon him who would impeach legislative action, to point out wherein it infracts that superior law; and it has often been declared that it is only when the inconsistency is palpable, the interposition of judicial reprobation becomes admissible. It was, indeed, thought in *Menges v. Wertman*, 1 Pa. St. 218, that this principle had been carried so far as, practically, almost to be equivalent to a relinquishment of the authority itself. But since then a more reasonable sentiment has prevailed, and the right of our courts to declare the nullity of an act of unconstitutional legislation has not only been dis-

tingly recognized, but their duty to do so emphatically asserted and firmly executed.

Still, the salutary rule that inquires for certainty of infraction remains, and it is only by its due application the line of separation between legislative and judicial authority is preserved. When it comes to be disregarded, and questions of constitutional power are made to turn on considerations of expediency, or even upon axioms of abstract morality, the sin of usurpation may well be charged on the administrators of the law. Their maxim should be, and I believe is, that caution in arriving at a conclusion adverse to the validity of a legislative act is as essential to public safety as firmness in pronouncing that conclusion when it is fairly attained. In the execution of this important power, caution and courage, deliberation and determination, should assist each other. All of these qualities are essential to the magistrate who is called on to pronounce between the primal ordinance and the ordinary statute. We come back, then, to the question, In what particular is the constitution violated by the act of the twenty-seventh of March, 1845? It lies, as I have said, on the assailants of this law to inform us. In the effort to do so, they point to that section of the bill of rights which prohibits deprivation of life, liberty, or property, except by the judgment of peers or the law of the land. Of the importance of this principle, which denounces as lawless and arbitrary every unauthorized attempt to transfer the property of any one, without his consent, to the use of another, I am deeply sensible, and I concur most heartily in those adjudications which sustain a doctrine so essential to social order and rational liberty.

But admitting its application to the public treasury of a county deposited with the public agents for the purpose of defraying the just and necessary expenses incurred in carrying on the business of the community, I cannot perceive how a law, providing for the adjustment and discharge of an obligation incurred by that community, can be thought obnoxious to the imputation of infringing on this principle. It may be said that assuming the existence of obligation is, in effect, begging the question at issue. But I do not here use the word as expressive of perfect liability, resting on both moral and legal sanctions, and capable of being enforced as well in a court of law as in a court of conscience. I refer to those duties which, resting only in good morals, are sometimes called imperfect obligations, because, though recommended by conscientious conviction, they yet lack a remedy sufficient to compel the

due observance of them. These defective obligations, it will presently be shown, have always been esteemed in Pennsylvania vigorous enough to sustain the interposition of legislative aid, without involving a breach of constitutional provision.

I have already observed that, had the act of 1845 been made simultaneously with the kindred statute of 1843, no objection against its constitutionality could have been offered. When providing for the removal of causes, the legislature possessed the undoubted right of directing upon whom should devolve the costs of litigation and the method of ascertaining their amount. This would have been but the exertion of an ordinary power, brought into action whenever the subject of legal costs is agitated in the general assembly. And what difference in morals can it make that a year or two was suffered to elapse between the enactment of the two laws? Had the leading act stipulated for the consent of a county before the causes pending in her tribunals could be removed, there would be some reason for objecting that the consent being obtained under a system which did not contemplate saddling her with the costs to be incurred, it would be unjust by retroaction to impose on her a burden she might have in the beginning declined to assume. Yet even this objection, however well founded, would be of insufficient force to overthrow a legislative act. Mere suggestions of hardship have never been permitted to work so grave a consequence; and it has even been doubted whether a statute, contrary to the principles of natural justice, but within the powers conferred by the constitution, could be declared invalid: *Commonwealth v. McCloskey*, 2 Rawle, 374. But, however this may be, the change of venue provided by the law before us was not made dependent on the assent of the county authorities. It was to be effected independently of their assent.

What matters it, then, that no notice was given prior to the removal, that they might be called on to bear their proportion of the future litigation? None whatever, and for the simple reason that notice could have exerted no influence on the ultimate transfer of jurisdiction. It results that not the slightest injustice has been inflicted on the debtor counties, for we are bound to accept the measure of removal as dictated by public policy and the convenience of the suitors, and if so, it was an obvious duty to make the provision. The defendant then occupies the position of one to whom a service has been rendered by another, though not at his request. This species of benefit

has long since been recognized by our courts as creating a moral duty in the recipient, sufficient to furnish a consideration for a subsequent promise to pay. A moral or equitable obligation is a sufficient consideration for an assumption, says *Clark v. Herring*, 5 Binn. 33. And where a man's interest is promoted, though not at his request, and he afterwards engages to pay, his promise will bind him, is the doctrine of *Greeves v. McAllister*, 2 Id. 592. Laying hold upon the principle thus recognized, our legislature has frequently interfered to give effect to these duties of imperfect obligation, and though this exercise of power has been frequently assailed, it has always been sustained in entire consistence with the constitution.

Of this class of remedial laws are the statutes for rendering effective imperfect acknowledgment of deeds by married women, the effect of which is to bar their estates in dower: *Barnet v. Barnet*, 15 Serg. & R. 72 [16 Am. Dec. 516]; *Tate v. Stoolzfoos*, 16 Id. 35 [16 Am. Dec. 546]; *Mercer v. Watson*, 1 Watts, 356; those retroactively curing defects in legal proceedings: *Underwood v. Lilly*, 10 Serg. & R. 9; validating pending suits: *Bleakney v. Farmers' Bank of Greencastle*, 17 Id. 64 [17 Am. Dec. 335]; modifying an existing remedy, or removing an impediment in the way of redress by legal proceedings: *Bolton v. Johns*, 5 Pa. St. 145 [47 Am. Dec. 404]; and to come nearer home, providing for the vindication of an existing right, by authorizing an action where none existed before: *Hepburn v. Curts*, 7 Watts, 300 [32 Am. Dec. 760]; *Turnpike Company v. Commonwealth*, 2 Id. 433. In the last of these cases, the court asserted the broad doctrine that where a right exists without a remedy, the legislature may rightfully provide one. This was repeated and approved in *Dale v. Medcalf*, 9 Pa. St. 110, as well as in *Biddle v. Starr*, Id. 466, where it was truly said this indispensable and salutary power must reside somewhere, and has been so often exercised by the legislature that to doubt its competency would occasion incalculable mischief, by unsettling titles held under this kind of special legislation. To this list of authoritative recognitions of the principle, that where a moral right exists the legislature may give it legal effect, may be added *Menges v. Wertman*. That case has been much criticised as countenancing an erroneous application of the principle, and I am free to say that, had I then been a member of the court, such would have been the inclination of my mind. But though a somewhat startling result was then produced, it has not had the effect of drawing the principle itself into impeachment. Indeed, it is

now too well settled to be successfully assailed; the only difficulty felt being in its application. No such difficulty is, however, encountered here. It results that the common pleas of Union possessed jurisdiction of the subject-matter, and as nothing has been urged against the doctrine of the decree pronounced, it must be affirmed.

Decree affirmed.

UNCONSTITUTIONALITY OF LEGISLATIVE ACT MUST BE APPARENT BEFORE COURTS WILL INTERFERE: See *Baughers v. Nelson*, 52 Am. Dec. 694, citing prior cases in the note. The principal case is cited to the point that the judiciary may interpret but must obey the laws, in *Smith v. Judge Twelfth District*, 17 Cal. 562.

ASSAILANT OF STATUTE MUST CLEARLY SHOW WHEREIN IT IS UNCONSTITUTIONAL: See *Baughers v. Nelson*, 52 Am. Dec. 694, and note citing prior cases.

REMEDIAL LEGISLATION, POWER OF LEGISLATURE AS TO: See *Bruce v. Schuyler*, 46 Am. Dec. 447; *McMillan v. Sprague*, 35 Id. 412.

VESTED RIGHTS, GUARDED AGAINST LEGISLATIVE INTERFERENCE, are such as may be adhered to without violating any principle of sound morality: See *Baughers v. Nelson*, 52 Am. Dec. 694.

MORAL OBLIGATION OR EQUITABLE DUTY, WHEN SUFFICIENT CONSIDERATION for promise to pay: See *Warren v. Whitney*, 41 Am. Dec. 406, and note; *State v. Reigart*, 39 Id. 628, and note citing prior cases; *Stafford v. Bacon*, 37 Id. 366, and note; *Valentine v. Foster*, 35 Id. 377, and note. See also, to the point that loss to promisee is sufficient consideration, *Adams v. Wilson*, 45 Id. 240; *Chick v. Trewett*, 37 Id. 68, and cases cited in the notes thereto.

THE PRINCIPAL CASE IS CITED in *Menges v. Dentler*, 33 Pa. St. 497, and *Shont v. Brown*, 61 Id. 327, as repudiating the doctrine that the legislature may pass laws trenching on the province of the judiciary or divesting vested rights in general, and as discountenancing *Menges v. Wertman*, 1 Id. 218.

LLOYD v. WEST BRANCH BANK.

[15 PENNSYLVANIA STATE, 172.]

ACTS OF OFFICERS OF BANK WITHIN SCOPE OF GENERAL USAGE, practice, and course of business of such institutions will bind the corporation in favor of third persons, who did not know at the time that the officer was acting beyond the scope of his authority.

ACT OF TWENTY-FIFTH OF MARCH, 1824, FOR GOVERNMENT OF BANKS, intends by the word "deposits" current money received by the bank as such, and does not authorize a deposit of a sealed bundle containing notes, the issuance of which had been interdicted.

NO ONE CAN BE MADE BAILEE OF ANOTHER'S GOODS without his own consent, express or implied.

SERVANT TAKING GOODS ON DEPOSIT WITHOUT AUTHORITY of and unknown to his master will alone be liable therefor, though he deposit them in his master's house.

DEGREE OF CARE NECESSARY IN CASE OF GRATUITOUS DEPOSIT, to avoid imputation of bad faith, is estimated by the carefulness which the depository uses towards his own property of a similar kind.

MERE DEPOSITARY, WITHOUT ANY SPECIAL UNDERTAKING, AND WITHOUT REWARD, is answerable for the loss of the goods only in case of gross negligence, which, in its effect on contracts, is equivalent to fraud.

ASSUMPSIT by Lloyd, executor of John C. Oliver, deceased, against the West Branch Bank to recover the value of certain Tide-water Canal notes deposited by Oliver with the cashier of the bank, Coryell. Coryell, without authority of the plaintiff, collected part of these notes, and took other notes of the Tide-water Canal Company, payable at a future time, for the balance. The case is otherwise sufficiently stated in the opinion. Plaintiff seeks to recover the full amount of the deposit. Defendant tenders to plaintiff and leaves with the prothonotary the Tide-water notes which were taken by the cashier for the balance of the special deposit. Verdict was rendered for the plaintiff for the amount only of cash collected on said notes. Plaintiff brings error.

Maynard, for the plaintiff in error.

Armstrong, for the defendant in error.

By Court, COULTER, J. The recognized and known functionaries, and especially the officers of a bank, are held out to the world as having authority to act according to the general usage, practice, and course of the business of such institutions.

If it were otherwise, there would be no safety for the public in doing business with any one of such institutions; because their charters differ in some respects, and individuals cannot be presumed to carry these documents in their pockets as a *vade mecum*. Their acts, therefore, within the scope of such usage, practice, and course of business, will bind the corporation, in favor of third persons transacting business with them, and who did not know at the time that the officer was acting beyond and above the scope of his authority. The property of stockholders is not bound by the irregular unauthorized transactions or declarations of their officers, beyond the just sphere of their legal action. But if stockholders, without objection or interference, witness a course of business, usage, and practice on the part of their officers, this justifies third persons in believing that such usage of the officers is sanctioned by the principal and authorized by law. The first questions which arise in this case are, whether the statute authorizes such kind of deposits as was made by Oliver in this instance; and second, whether, by general usage and custom of the bank, they are authorized and sustained. The statute does not authorize

such deposits. It never was designed, by the framers of the statute, that the bank should be converted into a kind of pawnbroker's shop. By the seventeenth article, for the government of banks, in the act of the twenty-fifth of March, 1824, it is provided that the banks shall make a return of their condition to the legislature, in which, among other things, they are required to set forth their deposits. The universal course of business shows what the legislature meant by "deposits," that is, money, current money, received by the banks as such, and not old clothes or ear-rings, or as in this case, a bundle sealed up, and containing Tide-water Canal notes, the issuing of which had been interdicted, and in relation to which it would be a violation of duty in the bank to countenance and aid in their circulation. But if they had been received by the cashier as money, and had been, as such, mingled with the funds of the bank, and credited on the books as so much money, the corporation would be liable, and their redress would have to be sought from the cashier. But here they were sealed up in a package and put into a safe, by the cashier, to accommodate Oliver.

The next question is, whether there was any such general usage, custom, and practice of the cashier of that bank, to act as a voluntary bailee, without reward, in such like cases, as to make the corporation liable for his acts. I have not been able to see such evidence on the paper book. There is no evidence on the subject, except that, at the same time, it appears that Cowden put a bundle of his, sealed up in the same way, into the safe. No person, corporation, or individual can be made the bailee of another man's goods without his own consent, express or implied. If the servant, of his own head, and without authority of his master, takes goods on deposit, unknown to his master, although they be deposited in the master's house, he is not answerable, but the servant only. There must, in order to induce a legal liability on any one, be a contract, express or implied. There is no knowledge or permission established in this case, on the part of the directors, of any such general rule, usage, or practice as would authorize the implication of a contract on the part of the corporation.

The other question remaining in the cause is, whether the directors of the bank did, in fact, specially make a contract that involved responsibility. The only evidence of this is, that Coryell, the cashier, testified that some of the directors were present when he started to Baltimore, and when the packages

of Tide-water Canal notes were opened; how many, do not appear, certainly not a majority. Nor does it appear that anything was known to them of Cowden's bundle, or Oliver's; although we may presume the cashier told them what he was going to do with the notes. He took the bundle of Cowden's notes, and the bundle of Oliver's notes, and he took the amount of notes of the same kind, belonging to the West Branch Bank, with him to Baltimore; and with his acts and doings the bank was satisfied, and Cowden was satisfied. He consulted Lloyd, the friend of Oliver, on the propriety of taking the notes with him to Baltimore; but Lloyd could give no instructions, and he wrote to Oliver, but received no answer, and Coryell thought it best to take Oliver's notes with him. The twenty per cent paid on them he paid into the West Branch Bank to Oliver's credit, and offered the new notes, which he received for the balance, to Oliver, who refused to take them, and brought this suit. Suppose, for a moment, the bank was the bailee; could she be considered in any other possible light than a bailee without reward? It is not pretended that any reward was given, or that the bank enjoyed any advantage. Well, then, the bank was only bound as for what is called a naked deposit, and in such cases, the bailee will be answerable only for gross negligence or a breach of faith. Now there is no evidence whatever of any special undertaking by Coryell. It was a simple deposition, in which, of course, there was an implied engagement on the part of the bailee that he would take care of it.

The degree of care which is necessary to avoid the imputation of bad faith is estimated by the carefulness which the depository uses towards his own property of a similar kind. This is now the received law as to this kind of bailment, notwithstanding it is denied by Lord Coke in 1 Inst. 89 b. It is recognized in *Coggs v. Bernard*, 2 Ld. Raym. 909. And the same law as to gratuitous bailment is mentioned by Sir William Jones, and is sanctioned in *Foster v. Essex Bank*, 17 Mass. 501 [9 Am. Dec. 168]. A mere depository, without any special undertaking, and without reward, is answerable for the loss of the goods only in case of gross negligence, which, in its effect on contracts, is equivalent to fraud. The accommodation here was to the bailor, and to him alone, and he ought to be the loser, unless he in whom he confided, the bank or the cashier, has been guilty of bad faith, in exposing goods to hazards to which they would not expose their own. These notes of Oliver's having been taken care of precisely as the

bank's own notes of the same kind, and as Cowden's notes were cared for, it would seem that she has not been guilty of bad faith or *crassa negligentia*. Suppose an individual would deposit a quantity of flour with another, who put it with his own; but discovered, after some time, that the whole lot would spoil and be lost, unless removed and sold; and he should remove and sell his own, and leave that of the bailor in the same place where it was deposited until it soured and spoiled, would the bailee in such case act with as much good faith as if he had removed the bailor's flour with his own, and sold it and given the bailor the money? Now, in this case there is not a particle of evidence that the deposition was not cared for in the very best manner that it could be done, and in the same way that the bank's own property of the same kind was cared for. But, however this may be, there is no evidence that the bank made any contract with Oliver, either express or implied. They are, therefore, not liable. If Oliver has any remedy, it is against Coryell. The circumstance of the twenty per cent being paid into bank cannot possibly have the effect of fixing or implicating the bank in any contract on the subject, because there is no evidence whatever that the bank knew anything else than that Coryell was acting as agent of Oliver in disposing of these Tide-water notes, if they even knew that this credit was given for a payment out of money received by Coryell on that account.

There is nothing to show that the directors were made aware of the source or fountain from which that payment came.

We perceive nothing in anything alleged against the instructions of the court below which ought to disturb this judgment. They went far enough in favor of the plaintiff below.

Judgment affirmed.

BANK BOUND BY ACTS OF ITS OFFICERS WITHIN SCOPE of their customary authority: See *State v. Commercial Bank of Manchester*, 45 Am. Dec. 280, and note. Notice to officer within scope of his duties is binding on the bank: See *Goodloe v. Godley*, 51 Id. 159, and note. In *Pattison v. Syracuse National Bank*, 80 N. Y. 90, the principal case is commended for its decision under the circumstances, but is declared not to be "authority for the proposition that if a bank is in the habit of receiving, on deposit, coin or other valuables, such as are usually the subject of special deposits in banks, it will not be bound by the acts of its officers in receiving them.

CASHIER'S AUTHORITY: See *Merchants' Bank v. Marine Bank*, 43 Am. Dec. 300; *Elliot v. Abbot*, 37 Id. 227; *Farrar v. Gilman*, 36 Id. 766; *McHenry v. Ridgely*, 35 Id. 110; *Everett v. United States*, 30 Id. 584, and cases cited in the notes thereto. The principal case is cited in *Merchants' Bank v. State Bank*, 10 Wall. 650, as defining the authority of a bank cashier.

DEPOSITARY, WITHOUT REWARD AND WITHOUT ANY SPECIAL UNDERTAKING, is not liable for loss of goods deposited, except in cases of gross negligence: See *Foster v. Essex Bank*, 9 Am. Dec. 168; *Stanton v. Bell*, 11 Id. 744; *Beardlee v. Richardson*, 25 Id. 696; *Green v. Hollingsworth*, 30 Id. 680.

AGENT ACTING WITHOUT SCOPE OF HIS AUTHORITY will bind only himself: See *McClure v. Richardson*, 33 Am. Dec. 105; *Pitman v. Kintner*, Id. 469, and notes citing prior cases.

RIDGWAY, BUDD, & Co.'s APPEAL.

[15 PENNSYLVANIA STATE, 177.]

INTENTION OF PARTNERS TO BRING REAL ESTATE INTO PARTNERSHIP must be manifested by deed or writing placed on record.

IT IS NOT COMPETENT TO SHOW BY PAROL THAT REAL ESTATE conveyed to two persons as tenants in common was purchased and paid for by them as partners, and was partnership property.

SUBSEQUENT PURCHASER OR JUDGMENT CREDITOR IS NOT BOUND TO LOOK beyond the judgment docket, for, as regards them, it is the plaintiff's duty to see that his judgment is rightly entered.

OMITTING CHRISTIAN NAMES OF JUDGMENT DEFENDANTS IN DOCKETING JUDGMENT, though it will remain good between the parties, is fatal to the claim as regards subsequent purchasers or judgment creditors.

WHEN ONE OF TWO INNOCENT PERSONS MUST SUFFER, he whose neglect has caused the loss must bear it.

THIS is an appeal from a decree distributing the proceeds of an execution sale of real estate belonging to Joseph Green, Robert B. Green, and George W. Green. On the twelfth of September 1846, Hallowell & Co. obtained judgment against John C. Wilson, Nathan Mitchell, and Robert B. Green, lately doing business under the firm name of Wilson, Green, & Mitchell. On the ninth of April, 1847, W. & R. P. Remington obtained judgment against the same parties comprising the same firm. In the judgment docket, this judgment was entered under the letter G, as against "Green, Wilson, & Mitchell," under the letter M, as against "Mitchell, Green, & Wilson," and under the letter W, as against "Wilson, Green, & Mitchell." The judgment of Ridgway, Budd, & Co., the appellants, was against Joseph Green, G. W. Green, and R. B. Green, and under this judgment the property was sold. The history of this judgment and of the title to the property is as follows: In the latter part of 1845, Joseph Green, David Howard, George W. Green, and Robert B. Green formed a partnership for the manufacture of iron, under the name of Green, Howard, & Co. On the first of April, 1846, they purchased from Henry Lantz the land in question, taking a deed to themselves as tenants

in common. On the twenty-sixth of August, 1846, David Howard assigned all his interest in the partnership property and the land in question to the three Green brothers, who continued to carry on the business under the firm name of Green & Brothers. On the fifteenth of November, 1847, Green & Brothers borrowed four thousand dollars from Ridgway, Budd, & Co., and gave them a bond for the amount, with power to enter judgment. Before the loan was made, a certificate of the prothonotary of Union county was furnished by Green & Brothers to Ridgway, Budd, & Co., that no judgments existed against Green & Brothers, except one which was not involved in this appeal. On the eleventh of December, 1847, Green & Brothers failed. Ridgway, Budd, & Co. entered judgment on their bond against Joseph Green, G. W. Green, and R. B. Green, and sold the iron-works and the land in question thereunder, and the proceeds were paid into court for distribution. It was contended by Hallowell & Co., and W. & R. P. Remington, that their judgments were entitled to prior payment, alleging that the interest in the land sold of Robert B. Green, a party to their judgments, was sufficient to pay them. Ridgway, Budd, & Co. claimed that the land was purchased with partnership funds of Green & Brothers, and was therefore partnership property, and first applicable to the payment of partnership debts. For this reason they urged priority in payment of their judgment, though it was subsequent in point of time. An auditor was appointed, and reported that the judgments of Hallowell & Co. and W. & R. P. Remington should be first paid out of the proceeds of the execution sale. The report of the auditor was confirmed by the court, and Ridgway, Budd, & Co. appealed. The act of twenty-ninth of March, 1827, Purdon's 7th ed., sec. 3, p. 996, provides for the entry of judgments on the judgment docket, and among other things prescribes that "the entries in each case in said judgment docket shall particularly state and set forth the names of the parties," etc.

Miller and Casey, for the appellants.

Woods, for the appellees.

.By Court, ROGERS, J. We see no error in the decree allowing the claim of Hallowell & Co. The judgment, being prior in date to the judgment of Ridgway, Budd, & Co., and the property sold being the separate estate of each of the partners in the firm of Green & Co., must be first paid out of the proceeds of sale. There is nothing to distinguish this case from

Hale v. Henrie, 2 Watts, 143 [27 Am. Dec. 289], recognized in *Kramer v. Arthurs*, 7 Pa. St. 165, and in the recent case of the *Lancaster Bank v. Holmes*. When partners intend to bring real estate into partnership, their intention must be manifested by deed or writing placed on record, that purchasers and creditors may not be deceived. To affect the title or possession of land, it is not competent to show by parol that real estate conveyed to two persons as tenants in common was purchased and paid for by them as partners, and was partnership property. This is firmly settled in the cases cited, and in other cases which it is unnecessary to quote. Here there can be no doubt the property was held as a tenancy in common; and as nothing was put on record manifesting the intention of the partners to regard it otherwise, it must be treated as separate estate, and of course, liable as such to their creditors. In all such cases, parol testimony is totally disregarded.

Next, as to Remington's judgment. That judgment is entered in the continuance docket, William Remington and Richard P. Remington, trading under the firm of Remington & Co., against John C. Wilson, Robert B. Green, and Nathan Mitchell, trading under the firm of Mitchell, Green, & Wilson.

This is all very well; but in transferring it to the judgment docket, it is entered, under the letter G, as a judgment against Green, Wilson, & Mitchell, omitting the Christian names of each of the partners. It must be, in the first place, remarked that a subsequent purchaser, or judgment creditor, is not bound to look beyond the judgment docket. This is ruled in *Hance's Appeal*, 1 Pa. St. 408; and to the same effect is *Mann's Appeal*, Id. 24; *Bear v. Patterson*, 3 Watts & S. 233; *Mehaffy's Appeal*, 7 Id. 200. The remedy of the party aggrieved is against the prothonotary; for, as it regards purchasers and creditors, it is the plaintiff's duty to see that his judgment is rightly entered in the judgment docket: *Wood v. Reynolds*, Id. 406. Is this, then, a good judgment, entitled to preference, as against Ridgway, Budd, & Co.? And we are of opinion it is not. We think that the failure to add the Christian names is fatal to the claim. That, though good as between the parties, it cannot affect subsequent purchasers or judgment creditors. As he is bound to see that his judgment is rightly entered, he is in default. He has omitted his duty in putting it on record in such a shape as deceives purchasers and creditors, or, at any rate, to put them to unnecessary trouble, inconvenience, and risk. It is possible that, in this case, by taking extraordinary pains, Ridgway, Budd, & Co. might have ascertained

that this was a judgment against a firm of which Robert W. Green was a member. But some names may be easily supposed, which would puzzle, if not baffle, every search or inquiry. This is a fit occasion to apply the equitable rule that, when one of two innocent persons must suffer, he whose neglect has caused the loss must bear it. W. & R. P. Remington have a remedy against the prothonotary; and it may be doubted whether Ridgway, Budd, & Co. have any.

Decree affirmed as to Hallowell's judgment.

Reversed as to the Remington judgment.

PAROL EVIDENCE TO VARY LEGAL EFFECT OF WRITTEN INSTRUMENT: See *Pack v. Thomas*, 51 Am. Dec. 135, and note citing prior cases; *Union Bank v. Meeker*, 50 Id. 559.

REAL ESTATE PURCHASED WITH PARTNERSHIP FUNDS does not, for that reason merely, become partnership property: See *Wheatley's Heirs v. Calhoun*, 37 Am. Dec. 654, citing prior cases in the note.

REALTY BOUGHT WITH PARTNERSHIP FUNDS FOR PARTNERSHIP PURPOSES IS PARTNERSHIP PROPERTY, as between the partners themselves. This is held in *Abbott's Appeal*, 50 Pa. St. 239; and the rule of the principal case is declared to prevail as regards purchasers and creditors only. See *Buchan v. Sumner*, 47 Am. Dec. 305, and note; *Dyer v. Clark*, 39 Id. 697, and note.

INTENTION OF PARTNERS TO HOLD REALTY AS PARTNERSHIP PROPERTY must be manifested by deed: See *Hale v. Henrie*, 27 Am. Dec. 289. The principal case is cited as establishing this proposition as regards purchasers and creditors, in *McCormick's Appeal*, 57 Pa. St. 59; *Lefevre's Appeal*, 69 Id. 125; *Calhett v. Thomas*, 1 Phila. 464.

SUBSEQUENT PURCHASER OR JUDGMENT CREDITOR IS NOT BOUND TO LOOK beyond the judgment docket. The principal case is cited on this point in *Stephen's Ex'r's Appeal*, 38 Pa. St. 14; *In re Fulton's Estate*, 51 Id. 214. In *York Bank's Appeal*, 36 Id. 460, it is held that a judgment confessed by one copartner in the firm name is valid as between him and the creditor, though void as to copartners.

OMITTING CHRISTIAN NAMES OF JUDGMENT DEBTORS IN DOCKETING JUDGMENT renders it invalid as to subsequent incumbrancers. The principal case is cited to this point in *Jones's Estate*, 27 Pa. St. 337; *Coyne v. Souther*, 61 Id. 457. See *Buchan v. Sumner*, 47 Am. Dec. 305, where it is held that under a statute requiring an alphabetical docket, the docketing of the judgment under the first letter of the Christian name of the debtor, instead of under the first letter of his surname, invalidated the lien as against a subsequent judgment duly docketed.

GOODMAN v. GAY.

[15 PENNSYLVANIA STATE, 188.]

VERDICT RENDERED WHEN ISSUE OF FACT IS JOINED ON ONE COUNT, but before judgment is reached on demurrers to other counts, will be considered as rendered on the first count only.

SUBSEQUENT COUNTS INTELLIGIBLY REFERRING TO TIME CORRECTLY AVERRED IN FIRST COUNT sufficiently show the causes of action alleged therein to have accrued before suit brought.

OWNER OF HORSE ALLOWING HIM TO GO LOOSE IN STREETS of a populous city is liable for the personal injuries caused by the horse, without allegation or proof that he knew the horse was vicious.

GIST OF ACTION FOR PERSONAL INJURIES SUFFERED FROM ANIMALS is an act done by defendant, not sanctioned by law or custom, from which he must have known that injury might result.

APPELLATE COURT WILL PRESUME THAT LEAVE WAS GIVEN TO FILE ADDITIONAL COUNTS unless the contrary appears from the record.

CASE by John Goodman against James Gay, for injuries resulting to plaintiff's son from a kick received from defendant's horse while the horse was at large within the limits of the town of Kensington. Damages were laid at one thousand dollars. The general issue was pleaded by the defendant. Thereafter two new counts were filed successively, each of which defendant moved to have struck off the record; and the motions being denied, he demurred to each specially. The demurrers to both counts were still pending when the cause was tried. Verdict was rendered for the plaintiff for one hundred and twenty-five dollars. Plaintiff moved for a rule to show cause why a new trial should not be granted. The motion was denied, and plaintiff presented a bill of exceptions. Both demurrers were afterwards overruled, and judgment thereon rendered for the plaintiff *pro forma*. Plaintiff brought error. The exceptions upon which this decision is based sufficiently appear from the opinion.

McGlaughlin, for the plaintiff in error.

Brightly and Pulte, for the defendant in error.

By Court, COULTER, J. It is difficult to tell exactly from the paper book the precise position of this cause. It has been argued as if the verdict and judgment were upon all the counts; and yet there is an issue to the country only upon the first count; and as to the second and third, there is a special demurrer to each. The verdict, therefore, must be considered as rendered on the first count, because on that only was there an issue in fact. And to the trial, progress, and result certain exceptions were filed and signed, as appears by the paper book, all relating to the first count. These I will consider directly. The defendant demurred specially to the second and third counts, and pending these demurrers the plaintiff went on to trial, I presume, on the first count, as that only was triable before a jury. After verdict the demurrers were overruled, and

judgment rendered on them for the plaintiff. As to its not appearing in these two counts demurred to that the injuries complained of were committed or inflicted before suit brought—that is a mistake. It is clearly enough averred in the words: “Afterwards, to wit, the same day and year aforesaid [referring to the injury in the first count], did permit and suffer,” etc., “and afterwards, whilst the defendant so kept the same,” obviously averring and meaning that whilst the defendant kept the horse, as averred in the first count, all subsequent statements as to time referred to and hung upon the time averred in that first count. And this is quite sufficient.

The second ground of special demurrer is as to the *scienter* of the defendant in relation to the vicious habit of the animal. And this is the ground of the demurrer to the third count. In the third count, it is alleged that the plaintiff unlawfully and wrongfully permitted the animal to run at large, etc., and in all of them, Kensington, the *locus in quo*, is asserted to be a densely populated place, which is a matter publicly known, and that it is part of a great and populous city. The demurrer, then, on this ground, opens up the same question that occurs in the bill of exceptions signed on the trial of the cause, and that is, whether a person who voluntarily turns out a horse in a populous city, to play and gambol in the streets, is responsible in an action on the case for any injury which that horse does by kicking a boy or child, without its being proved or averred that the owner knew the horse was vicious, and had a habit of kicking men or boys or women. There are English cases, undoubtedly, and some American, which hold that the owner of domestic animals is not liable for injuries they commit, unless he knew that they were vicious. But these cases generally are in relation to dogs, a domestic animal which everybody in every place owns and keeps, and suffers to go at large. The custom is almost as old as time, for Tobit had his dog. The universality of this custom has made the practice lawful, unless where it is interdicted by statute, which has been done to a certain extent in our state. And within the limits of that interdict, it has been held that the owner who does not chain or house up his dogs is liable for the injury they commit, whether he knew they were addicted to killing sheep or not: *Paff v. Slack*, 7 Pa. St. 254.

In relation to cases where the injury was inflicted by vicious oxen or bulls in England, or horses, if any such there be, they, I imagine, occurred while the animals were on the owner's land, or at common. In a late case in England, *Mott v. Wilkes*,

8 Barn. & Ald. 313, Justice Bayley says that in case of a dangerous animal likely to do mischief to another in a private close, it should seem that public notice ought to be given, although no one has a right to enter. And Justice Holroyd, in the same case, says that if there be a foot-path in a close, and there is a dangerous animal put in by the owner, he must give notice, or he will be liable to an action for any injury committed. To the same point may be cited *Bird v. Holbrook*, 4 Bing. 642, and *Deane v. Clayton*, 1 Moore, 234. If, therefore, the owner or occupier of a close is held liable for injuries committed within it by a dangerous animal, unless he gives public notice, *a multum fortiori*, a person who turns out a horse in the streets of a populous city, where there must be danger arising even from the nature and disposition of the horse to gambol, to plunge, and kick up his heels, and from the heedlessness of children, the occupation and busy pursuits of men and women. The owner has no right, either by law or custom, to turn a horse loose in the streets of a city. All men know that a horse which has been stabled and well fed will, when turned out, run and plunge, and become dangerous in the midst of people. If one man has a right to turn out his horse, every man has the same right; and if the one fourth of people who own horses in a city would turn them out on the streets, not only the women and children, but even the men would have to abandon them.

There is no reported case in which it was held that a person who turned out his horse in the streets of London or New York was not answerable, if he run over a child or a woman, unless the owner knew, when he turned him out, that he was vicious and prone to kick. But I may say that all horses are, when turned loose, more or less dangerous in confined streets; and all men know this. The gist of the action is that the defendant did an act not sanctioned by law nor custom, from which he must have known that injury might result. He, therefore, is less innocent than the man who was attending to his own business in a lawful public street, where loose horses have no right to be. In other words, the defendant was guilty of negligence, and the plaintiff was guilty of none; and therefore the defendant is liable to the action without proof that he knew the animal was vicious. Because it necessarily results from the nature and habits of the animal that he is, when loose, dangerous in a greater or less degree in populous streets. If a man's horse were to break the stable door and get out without the owner's consent or knowledge, it would be

a different matter. That would be accident or misadventure, and the same as if a man's horse should take fright and run away with him in a street. These things the will or the strength of man cannot altogether prevent.

But here, the averment in the *narr.* in all the counts is, that the horse was turned out by the defendant. Although there are some expressions of the *nisi prius* judge which would seem to extend the rule we lay down beyond the limits of populous cities or towns, yet all taken together, it relates to the streets of Kensington, and that was the actual case. We have a case in our own books which seems to go the whole length of establishing that, when an owner turns out an animal, the class of which contains individuals often dangerous, both from their nature imperfectly subdued, and their habits, he thereby becomes responsible for the injuries it inflicts. Thus it was held in *Dolph v. Ferris*, 7 Watts & S. 369 [42 Am. Dec. 246], approved in *Paff v. Slack*, 7 Pa. St. 254, that a bull which went into the field of a neighbor of the owner, and gored his horse till he died, created a liability to pay for the horse by the owner of the bull, without regard to his being aware of any vicious propensity in the bull, or otherwise. The ground of the decision was, that the animal was naturally inclined to roam, and often guilty of mischief, and that, therefore, it was the duty of the owner to keep him on his own land.

There is nothing in the exception in relation to the jurisdiction of the court.

It has been decided that this court will presume that leave was given to file the additional counts, unless it appears that objection was made; and as the court below refused to strike them off, that in itself was leave. But these counts did the defendant no harm, as he alleges that they contain no cause of action, when the first does contain a good one, as he admits, if proved.

There is nothing in the other exceptions.

Judgment affirmed.

LIABILITY OF OWNERS OF ANIMALS FOR INJURIES CAUSED BY THEM: See *Marsh v. Jones*, 52 Am. Dec. 67, and note collecting cases in this series on injuries by vicious dogs. The principal case is cited in *Rosell v. Cotton*, 31 Pa. St. 526, to the effect that it is unlawful to permit a horse to run loose in the streets, and that the owner will be liable for injuries caused by him under such circumstances.

APPELLATE COURT, PRESUMPTION BY, AGAINST ERRORS NOT APPEARING EXPRESSLY UPON RECORD.—In *Irish v. Cloyes*, 30 Am. Dec. 446. it is held
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that a case on exceptions must be reversed for any error appearing on the record, however trivial may be the right affected. In *Union Bank v. Lea*, 41 Id. 275, it is held that a party cannot complain of slight error in the appellate court when it would have been corrected below at his request: See *Kohn v. Schooner Renaissance*, 52 Id. 577. But the appellate court cannot presume the existence of facts in support of the judgment contrary to what is shown by the record: *Locketts v. Townsend*, 50 Id. 723.

MITCHELL v. FULLER.

[15 PENNSYLVANIA STATE, 268.]

NEGOTIABLE INSTRUMENT SPECIALLY INDORSED BY PAYEE OR MADE PAYABLE SPECIALLY cannot be recovered on by any one except the special indorsee or payee, unless it appear either that it is reindorsed or re-assigned by the special indorsee or payee, or that he has received satisfaction. The mere possession of such instrument by the indorser who had indorsed it to another is not sufficient evidence of his right of action against his indorser, without reassignment or receipt from the last indorsee.

NEGOTIABLE INSTRUMENT WITH FIRST INDORSEMENT IN BLANK is afterwards assignable by mere delivery, as against the payee, drawer, or acceptor, though it have subsequent indorsements in full, for the subsequent holder by delivery may strike out intervening indorsements and declare and recover as indorsee of the payee.

THIS was a suit on a bill of exchange instituted by Martha Fuller, executrix of Horace Fuller, deceased, against Mitchell & Wynkoop. The draft was drawn on Mitchell & Wynkoop by Sands, Fuller, & Co., and payable to themselves. It was indorsed in blank by Sands, Fuller, & Co., and accepted by Mitchell & Wynkoop. There was also a special indorsement as follows: "Pay J. B. Trevor, esq., cashier, or order. [Signed] Hammond & Co." The name of Hammond & Co. was erased. Plaintiff filed a copy of this draft, omitting from the copy the special indorsement. Mitchell filed an affidavit of defense, alleging the special indorsement and charging that the writing filed as a copy of the draft was not a true copy. Upon inspection of the original draft, the court gave judgment for the plaintiff. Error was assigned on behalf of the defendant.

Markland, for the plaintiff in error.

Brinckle, for the defendant in error.

By Court, ROGERS, J. In the case of a special indorsement of a bill of exchange or promissory note, to enable any one but the special indorsee to recover on the bill, it must appear either that it is reindorsed or reassigned by the special indorsee, or

that he has received satisfaction. The mere possession of the note or bill of exchange by the indorser who had indorsed it to another, is not sufficient evidence of his right of action against his indorser, without a reassignment or receipt from the last indorsee. This ruled in *Gorgerat v. McCarty*, 2 Dal. 144 [1 Am. Dec. 270]; S. C., 1 Yeates, 94; *Zeigler v. Gray*, 12 Serg. & R. 43; *Welch v. Lindo*, 7 Cranch, 159; and in *Craig v. Brown*, 1 Pet. C. C. 171. But this rule obtains only when the note is specially indorsed by the payee, or made payable specially by the maker, for when the note or bill is indorsed in blank, the rule is otherwise. A blank indorsement makes the bill transferable by mere delivery. When the first indorsement is in blank, the bill or note as against the payee, drawer, or acceptor, is afterwards assignable by mere delivery, notwithstanding it may have subsequent indorsements in full; because a subsequent holder by delivery may declare and recover, as the indorsee of the payee, and strike out all the subsequent indorsements, whether special or not: Ch. Bills, 5th ed., 175, 176. In *Smith v. Clarke*, 1 Esp. 180, S. C., Peake, 225, a bill was indorsed in blank by the payee, and after some other indorsements, indorsed to Jackson or order; Jackson never indorsed the bill, but a recovery was had by a subsequent holder who had stricken out all the indorsements but the first. Lord Kenyon gives the reason for the decision. He said the doctrine contended for by the defendant's counsel was not supported by any case, and that it would clog the circulation of bills of exchange, if by indorsement of this sort, where there might be several, the holder was obliged to prove the handwriting of the several indorsers; that a bill being payable generally to a payee or his order, when he, to whose order only it was payable, by a blank indorsement, sent it into the world, that he meant it should have a general circulation, and any person into whose hands it came, *bona fide*, by proving the handwriting of the payee, entitled himself to sue; that as this gave him a title, he might strike out the names of all the intermediate indorsers, whether the indorsements to them were special or not.

Thus the distinction is clearly taken; this case falls within the latter class. Since *Smith v. Clarke*, *supra*, the law has been considered settled, and it would be dangerous now to disturb it. I know of no case where it has been even questioned. The latter class seems to be the rule; the former, for special reasons, is the exception. It has always been the policy of the courts, accommodating themselves to the wishes of the mercantile

world, to promote the free, unconstrained circulation of commercial paper; and hence it is they have adopted the rule that the holder may maintain suit in his own name by striking out the special indorsements. The presumption, and it is a fair one, is that he is a *bona fide* holder for value, or a trustee or agent for collection. The rule, however, is relaxed in favor of the maker of a note, who may make it payable in full by inserting the name in whose favor it is made, as drawee of a bill of exchange or payee of a note, who may indorse it specially for purposes of transmission and for safety, and so far to clog its circulation. Beyond this, the courts have wisely decided they are not at liberty to go. When the note is once indorsed in blank, subsequent holders cannot control its circulation. These principles are fully sustained by the authorities.

After an indorsement in blank by the payee or subsequent indorser, it is competent for the holder of the bill or note to make himself the immediate indorsee, and to claim by the blank indorsement: *Taylor v. Binney*, 7 Mass. 481; *Mullen v. French*, 9 Watts, 96. And where a person fairly and without fraud becomes possessed of a negotiable note, indorsed in blank, it has been held that he may maintain an action thereon, although it has not been legally transferred to him: *Little v. Obrien*, 9 Mass. 423; *Bowman v. Wood*, 15 Id. 534.

So where a promissory note, payable to order, is indorsed in blank, the holder has a right to fill it up with any name he pleases, and the person whose name is inserted will be deemed the legal owner; and if, in fact, the indorsement in blank was intended as a transfer for the benefit of another person, yet he would be considered as a trustee, suing for the benefit of the person having the legal interest: *Lovell v. Evertson*, 11 Johns. 52; *Sterling v. Marietta Co.*, 11 Serg. & R. 179.

This view of the case, so fully sustained by authority, is an answer to the other exception. The holder having stricken out the indorsements, the record contains a true copy of the note on which suit is brought.

Judgment affirmed.

BLANK INDORSEMENT BY PAYEE GIVES HOLDER RIGHT OF ACTION without regard to subsequent special indorsements: *Huie v. Bailey*, 35 Am. Dec. 214, and cases cited in the note. See *Sterling v. Bender*, 44 Id. 539, and cases cited in the note.

WIKOFF'S APPEAL.

[15 PENNSYLVANIA STATE, 281.]

REGISTER OF WILLS IS EMPOWERED BUT NOT REQUIRED TO DIRECT ISSUE OF FACT to the common pleas in every case where *caveat* is entered against the admission of a testamentary writing to probate.

ISSUE OF FACT SHOULD NOT BE AWARDED TO JURY by register of wills, when testimony of witnesses to establish the will is not impeached and there is no real conflict in the evidence.

DUTY OF REGISTER OF WILL AFTER EVIDENCE HAS BEEN HEARD is, in the exercise of a legal discretion, to decide upon it, or refer the decision to a jury; and the propriety of his determination may be examined on appeal.

IT IS PRESUMED THAT ALL SHEETS OF WILL written on separate sheets of paper are produced for probate, in the absence of evidence to the contrary.

WILL MAY BE MADE ON DISTINCT PAPERS, if they are connected by their internal sense, or by a coherence or adaptation of parts.

CANCELLATION OF BEQUEST, STANDING SEPARATELY FROM OTHER BEQUESTS, does not cancel the other bequests.

INTERLINEATIONS IN TESTATOR'S HANDWRITING are presumed to have been made at or before the execution of the will.

REPUBLICATION OF WILL BY CODICIL IS GOOD, though the will be not present at the time.

MEMORANDUM UNDER TESTATOR'S SIGNATURE DOES NOT INVALIDATE WILL on ground that the statute prescribes the signature to be at the end of the will, when the will is afterwards republished by codicil.

UNSIGNED ADDITION TO WILL DOES NOT INVALIDATE WILL on ground that the statute prescribes the testator's signature to be at the end of the will, if it bears neither upon the contents of the will nor on its interpretation.

TO EFFECT REVOCATION OF WILL, INTENTION TO REVOKE must appear clearly and unequivocally.

OMISSION TO MENTION CODICIL IN ACT OF REPUBLICATION, in which other codicils made prior to that act are mentioned, implies a revocation thereof; but this may be rebutted by circumstances showing a contrary intention.

THIS is an appeal from a decree of the register's court for the city and county of Philadelphia. The decree admitted to probate the will of Elizabeth P. Stott, and codicils thereto. The will consisted of different pieces of paper, upon which, from time to time, Mrs. Stott had inscribed portions of her testamentary desires. On the last of these papers, the will was duly signed, sealed, and witnessed. The codicil to Mrs. Minigerode read as follows: "In addition to my codicil (September 10, 1847), I give and bequeath to Mrs. Mary Minigerode, of Williamsburgh, Virginia, four thousand dollars. Elizabeth Phile Stott." The facts are otherwise sufficiently stated in the opinion.

Perkins and J. Otterson, jun., for the appellant.

Meredith and Clark Hare, for the appellees.

By Court, GIBSON, C. J. A register of wills is certainly not bound to award an issue whenever it is demanded. "Whenever a *caveat* is entered against the admission of any testamentary writing to probate," it is enacted, "and the person entering the same shall allege, as the ground thereof, any matter of fact touching the validity of such writing, it shall be lawful for the register, at the request of any person interested, to issue a precept to the court of common pleas of the respective county, directing an issue to be formed on the said fact, and also upon such others as may be lawfully objected to the said writing." The register is empowered, but not required, in every case to send every contested fact to a trial at law. The office of a jury is not to guess at the existence of circumstances, in the absence even of a presumption, for where there is no conflict of evidence, there is no contest of facts, and it would be absurd to incur the costs of a trial when there is nothing to try. But the register has not, on the other hand, an arbitrary discretion in the matter. Though the witnesses to establish a will swear all one way, their testimony may be encountered by evidence of bad character, or other matter, to raise a question for a jury; but where their testimony is consistent, and they are neither contradicted nor impeached, a jury would not be allowed to find against it; and it would be a vain thing to award a trial which must necessarily result in a particular way. When the evidence has been heard, it is for the register, in the exercise of a legal discretion, to decide upon it, or refer the decision to a jury; and the propriety of his determination may be examined on appeal.

In the present case, there was no question depending on evidence *in pais*, positive or presumptive; issues were prayed to determine whether the sheets produced to the register were all that originally constituted the will, and whether they were fastened together when they were signed. There was not a particle of extrinsic evidence that any other sheets had at any time existed; and in the absence of proof to the contrary, the presumption was that none but those produced for probate were present at the execution. It is attempted to be rebutted, in the first place, that the name of one of Mrs. Stott's sisters is not in the will, whence a conjecture that a provision must

have been made for her on a leaf not to be found; but conjecture is not a foundation for a verdict.

There is, in the second place, some confusion in the order of arrangement. It occurred to Mrs. Stott to number the devises and bequests in her will, as they were written from time to time on separate sheets; but the series became irregular, and some of the numbers were misplaced, whence an inference that some of the sheets are missing; but there is enough on the face of the papers to show that it is unfounded. Number two is repeated, and number three stands in the place of number four, and each of the remaining numbers stands in the proper place of its successor. But no number is wanting to indicate the loss of a bequest, or sheet; on the contrary, there is one sheet too many. A jury was demanded, therefore, to find a verdict, not only without evidence, but against a natural presumption. And what if the fact were as it has been surmised to be? The presumption of innocence is favored by the law, and as it would be criminal in a stranger to filch and suppress a part of a will, the presumption would be, in this case, that the missing bequest had been canceled or suppressed by the testatrix herself; and as the presumption would be that it might have stood separately from the other bequests, the cancellation of it would not be a cancellation of the rest. A testator may dispose of the several parts of his estate by distinct instruments, each being separately his will of the particular part, but all constituting together his whole will: *Hitchins v. Basset*, Show. 545. Now, when a testator has two wills which may stand separately, it will not be pretended that a cancellation of the one would be a cancellation of the other. The very case which the appellant would establish was ruled in *Sutton v. Sutton*, 2 Cowp. 812, in which it was held that a will may be good in part, though other parts of it may have been obliterated by the testator subsequently to the execution of it.

The demand of an issue, to try whether the sheets of which the will is composed were disconnected when it was executed, stands on the same untenable ground. It is a rudimental principle that a will may be made on distinct papers, as was held in *Earl of Essex's Case*, cited in *Lee v. Libb*, 1 Show. 69. It is sufficient that they are connected by their internal sense, by coherence or adaptation of parts. Were it otherwise, there is no evidence that the leaves were detached when the will was executed. They were sent to Mr. Binney for examination in

Mrs. Stott's life-time, as "three papers or collection of leaves," and they were found among her valuable papers in the same state at her death. In the absence of evidence to the contrary, the presumption is that they had always been so.

As to the interlineations proved to be in Mrs. Stott's handwriting, yet insisted on in the appellant's argument, though not included in his specifications, it satisfactorily appears from the cases cited on the other side that they are of no account. The presumption is, that they were made at or before the time when the will was prepared for the final act.

Even had the preceding objections been solid when the will was executed, they would be obviated by the subsequent republication of it. Mrs. Stott declared by a codicil that her will and codicils were written on three collections of leaves or sheets of paper—the will subscribed by particular persons, and the codicils bearing particular dates; that they contained her last will and testament; that she thereby republished the same, and desired them to have full effect, according to their substantial meaning, without regard to their dates, and as if they were all dated of that day. And these papers, as she described them, were found fastened together at her death. What more could she do to make them her will? Mr. Binney, who prepared the codicil of republication, identified them, after which there could be no doubt that no more were republished. Nor can it be doubted that republication by a codicil is good, though the will were not present at the time. This was, at one time, more than doubted by the English judges, by reason of a peculiar provision in their statute of frauds; but as there is no such provision in our statute of wills, it has not been doubted here.

It is argued, however, that the memorandum immediately below the signature to what was originally the will, avoided it on the principle of *Hays v. Harden*, 6 Pa. St. 409, because the signature by it ceased to be, in the words of the statute, at the end of the will. If this memorandum, which is without date, actually preceded the codicil of republication in point of time, it became incorporated in the body of the will, and the signature to the codicil became the signature at the end of the will. The presumption is that it did; but suppose that it did not. The matter in it bore neither on the contents of the will nor on its interpretation. It was not testamentary; and it was no more a part of the will than was the label on the back of it. "This will," subjoined the testatrix, "was commenced in the year of our Lord 1843, and added to as occasion required." Very dif-

ferent the additional matter in *Hays v. Harden*, which consisted not only of reasons for a precedent devise which might have influenced the construction of it, but an additional substantive devise, which showed that the preceding part had not disclosed the testator's whole counsel. The report of the case is imperfect; and it is necessary to say here that the additional matter was expressed in the following words: "3d. For the satisfaction of all concerned, and others; for many years I made my home and residence with my brother, residing on my farm, township as above; while laboring under the infirmities of life, his treatment towards me was of such a nature as to compel me to leave the house and find an asylum in the house of my nephew, Abraham Hayz, as above; in consideration of his hospitality towards me, I will and bequeath to him the above described farm." This was subscribed by witnesses, but not signed by the testator; and it was as distinctly testamentary as the memorandum before us is otherwise.

The last objection is to the probate of the codicil in favor of Mrs. Minigerode. It is doubtful whether the date at the head of it is referable to it or to a preceding codicil, and whether it was executed before or after the codicil of republication. If the former, it would undoubtedly be valid, as an independent addition to the will; if the latter, the omission of it in the act of republication might be an implied revocation of it. The law of the case has been clearly laid down in *Smith v. Cunningham*, 1 Add. Ec. 448, cited in the argument. In that case, as in this, a codicil had confirmed and republished the will, and several codicils specified by their dates, but not the codicils in contest; and in pronouncing sentence of probate, Sir John Nicholl said that the revocation alleged, if so at all, was an implied one, because there was no general clause of revocation; that all questions of revocation are in a greater or less degree questions of intention, because the very fact of revocation is said to be equivocal; and that the fact in that case was peculiarly equivocal, instead of being, as it ought to be, clear and unequivocal. And the *animus revocandi* was rebutted by the place in which the codicils had been kept, and by the company in which they were found; by the improbability of an intention to revoke, by proof of confidential intercourse with an executor and trustee nominated in one of them, till the testator's death; by the fact that they contained the only adequate provision for the testator's housekeeper; and by the fact also, that they contained a provision for the illegitimate

children—circumstances far less indicative of intention than those in the case under consideration.

One of the witnesses, who had been an attendant of Mrs. Stott seventeen years, testified that she was grieved that the legacy to Mrs. Minigerode was not in her will, and bade the witness see whether there were any papers about it in the portfolio; that the witness found them all there, the codicil included, and that they were found in the same place the day after the funeral. A niece of the testatrix testified that she always spoke affectionately of Mrs. Minigerode, who was her great-niece, and corresponded with her; that an affectionate intercourse was kept up till the parties were separated by death; that when Mr. Minigerode called to see her on her sick-bed, she said she was glad she had done what she had for his wife; that she spoke of this bequest several times during the spring, after the date of the codicil; that on one occasion she had the paper in her hands, and in answer to a question, whether it were not best to insert it in the will, replied it was the same thing, as it had her signature; and that she then placed it in the portfolio, where it was found at her death. No declaration of intention could be stronger. We are of opinion, therefore, that all the papers were properly admitted to probate.

Sentence affirmed.

POWER OF PROBATE COURT TO DIRECT ISSUE OF FACT TO JURY: See *Mothland v. Wireman*, 23 Am. Dec. 71. The principal case is cited in *Graham's Appeal*, 61 Pa. St. 46, on the power and duty of the register of wills to refer an issue of fact to a jury; also in *Estate of James Robinson*, 11 Phila. 33.

INTENT TO REVOKE MUST APPEAR PLAINLY, to make any act a revocation: See *Rhodes v. Vinson*, 52 Am. Dec. 686, collecting prior cases in the note.

TESTATOR'S NAME MUST BE SIGNED AT END OF WILL UNDER PENNSYLVANIA STATUTE: See *Grahill v. Barr*, 47 Am. Dec. 418, and note referring to other cases on this point. In *Heise v. Heise*, 31 Pa. St. 250, it is held that an unsigned addition to a once perfect will does not destroy the instrument, citing and distinguishing the principal case.

PARTIAL CANCELLATION, EFFECT OF.—A partial cancellation by testator is *prima facie* evidence of revocation, but is open to parol explanation: *Brown's Will*, 35 Am. Dec. 174; but in order to effect a revocation, the cancellation or destruction must be directed against the whole will: *Malone's Adm'r v. Hobbs*, 39 Id. 263. The principal case is cited to the point that a testator may obliterate a portion of his will after execution without destroying it, in *In re Will of W. H. Fuguet*, 11 Phila. 76.

WILL MAY BE WRITTEN ON SEPARATE SHEETS OF PAPER.—The principal case is cited as authority to this effect in *Ela v. Edwards*, 16 Gray, 99.

WALLACE v. HARMSTAD.

[15 PENNSYLVANIA STATE, 462.]

DEED FRAUDULENTLY ALTERED BECOMES VOID, and a *bona fide* purchaser from party altering the deed takes nothing by the deed.

AGENCY TO ALTER DEED CANNOT BE IMPLIED from acts of the principal in *pari*.

COVENANT on a ground-rent deed to recover ground-rent accrued by Wallace against Joseph Harmstad. A conveyance reserving a ground rental was made by Arrison and wife to the defendant. And pursuant to an understanding between Arrison and defendant, that defendant should have his own time to redeem, no words were inserted in the deed defining the term within which the rent reserved should be extinguishable but a blank space was left. After the execution and delivery of the deed, Harmstad received a note from Arrison's scrivener desiring him to bring the deed to the scrivener's office, as Arrison desired to have it recorded. Defendant delivered the deed to the scrivener. When he obtained the deed from the recorder there were inserted in the space which had been left vacant, and where words defining the term within which rent is redeemable are usually written, the words, "Within ten years from the date hereof." Subsequently, but before the institution of this action, Arrison and wife conveyed the rent to Wallace. The court refused to instruct the jury as requested by the plaintiff, and instructed them that under the above circumstances the presumption, in the absence of evidence, is that the alteration in the deed had been made by the plaintiff, or by some one by his authority or under whom he claimed. Verdict for the defendant, and plaintiff brought error.

Miller and Cadwallader, for the plaintiff in error.

J. A. Phillips, for the defendant in error.

By Court, GIBSON, C. J. The doctrine of deeds stands on the principles of the common law; the doctrine of commercial instruments stands on the principles of the law merchant. A deed is a solemn and a formal act; a commercial instrument is neither solemn nor formal. A deed is not intended for circulation or to be subject to alteration by the exigencies of trade; but a promissory note or a bill of exchange may induce new responsibilities, while it flits from hand to hand as if it were a part of the general currency. It is not strange, therefore, that a commercial and a common-law security should have different consequences in respect of responsi-

bilities to third persons. A fraudulent alteration of either avoids it between the original parties; but the necessities of trade require that a *bona fide* holder of a bill or a note be not involved in the consequences of their dealings. On the other hand, the assignee of a bond, whether legal or equitable, takes it subject to defalcation and the equities of the obligor. A decision in the case of a commercial instrument, therefore, cannot be a precedent for a case like the present. The fraudulent alteration of a deed makes every part of it a forgery; and it is so laid in an indictment. In *Rex v. Teague*, 1 Eng. Cro. Cas. 35, and in *Dawson's Case*, 2 East P. C. 979, S. C., 3 Ch. Crim. L. 1042, it was held that a forgery of a material part is a forgery of the whole, because the legal effect of the whole would be changed; and it would seem to be as absurd to claim through the forgery of a deed not locked up in the party's desk, as to claim through the theft of a horse not locked up in the owner's stable. There is no case or book in which a deed fraudulently altered has been treated as only voidable. The authorities collected in Sheppard's Touchstone, at page 68, prove that it is utterly void.

The attempt has been made to raise an authority, implied from the defendant's laches in parting with the possession of the instrument, to fill blanks in it to his prejudice before the ground rent was conveyed; but the only case cited to sustain it is that of a check, which is inapplicable to the present. There is no instance of an implied agency to alter a deed. The case of *Zouch v. Claye*, 2 Lev. 35, is not such. A and B had sealed and delivered a bond to C, and the name of D was afterwards interlined; but he also sealed and delivered it with the concurrence of the others, and it was held to be the bond of all three. The transaction was consummated in the presence of all; and as it was the immediate act of all, there was no agency in the case. The only case that might be supposed to give color to the argument is *Texira v. Evans*, 1 Anst. 228, cited by Mr. Justice Wilson in the great case of *Master v. Miller*, affirming S. C., 4 T. R. 320, which was, however, a case of express authority. Evans, wanting to borrow four hundred pounds, or as much as his credit would raise, executed a bond with blanks for the name and sum, and sent it into the market by a servant, who filled it up. On *non est factum* pleaded, Lord Mansfield held it to be a good deed. Mr. Preston, the learned editor of Sheppard's Touchstone, at page 139, expresses a powerful doubt of the solidity of that decision, inas-

much as it is founded on an assumption that a man may be bound by a deed executed in his name by an attorney not constituted by deed—contrary to a fundamental rule of the common law. That case can be sustained, if at all, only on the ground that the obligor had estopped himself by an act *in pais*. But it would be unreasonable, and inconsistent with the current of human transactions, to require a party to keep his deed under lock and key in order to preserve it from violation. Laymen are not conveyancers, and scriveners employed by them use printed forms to save trouble; but the law would exact extreme vigilance did it require their employers to supervise the filling of the blanks. The exceptions converge to this one point; and they have not been sustained.

Judgment affirmed.

DELEGATION OF AUTHORITY TO EXECUTE SEALED INSTRUMENT, or the ratification of such an act, must be by instrument under seal: See *Spofford v. Hobbs*, 48 Am. Dec. 521, and cases cited in the note; *Paine v. Tucker*, 38 Id. 255; *Reed v. Van Ostrand*, 19 Id. 529; *Blood v. Goodrich*, 24 Id. 121; *Jackson v. Murray*, 17 Id. 53.

ALTERATION OF INSTRUMENTS, EFFECT OF: See *Dow v. Jewell*, 45 Am. Dec. 371, and cases cited in the note. In *Harmstead v. Wallace*, 3 Phila. 227, the principal case is cited as deciding that the estate of the grantee is not affected when the deed reserving ground rent is materially altered by the grantor, but that the grantor and his privies cannot recover the rent.

PEIFFER v. COMMONWEALTH.

[15 PENNSYLVANIA STATE, 468.]

COMMON LAW FORBIDDING SEPARATION OF JURY IN CAPITAL CASE before they have been discharged is of substantial purport, and a disobedience thereof will invalidate the verdict.

SEPARATION OF JURY ON INDICTMENT FOR MURDER, after they have been impaneled and sworn, although with defendant's consent, invalidates their verdict, and the prisoner will be held to answer another indictment.

INDICTMENT of Martin Peiffer for the murder of his wife. After a trial jury was sworn, the court below suggested that, on account of press of business, the counsel for the commonwealth and for the defendant agree to allow the jury to separate and go to their respective homes, to reassemble in the jury-box on the following Tuesday. This was done. After the return of the jury, the trial proceeded, and the jury found the defendant guilty of murder in the first degree. The defendant was sentenced to death. Error was assigned on behalf of the defendant.

Neville, for the plaintiff in error.

Palmer, for the defendant in error.

By Court, GIBSON, C. J. Even the forms and usages of the law conduce to justice; but the common law, which forbids the separation of a jury in a capital case before they have been discharged of the prisoner, touches not matter of form, but matter of substance. It is not too much to say that if it were abolished, few influential culprits would be convicted, and that few friendless ones, pursued by powerful prosecutors, would escape conviction. Jurors are as open to prejudice from persuasion as other men, and neither convenience nor economy ought to be consulted, in order to guard them against it. Let them have every comfort compatible with their duties; but let them not be exposed to the converse of those who might pervert their judgment. Before the trials of Tooke, Hardy, and Stone, no English court had adjourned in the trial of a capital case; and when an adjournment became necessary, the jurors were kept together and closely secluded. We had preceded them. The slowness of counsel in challenging, their minuteness in taking down the words of witnesses, their protracted cross-examinations, and their endless speeches, had made it impossible to finish a trial at a sitting, and the jurors were disposed of, during the recess, as the English courts afterwards disposed of them. Such was the practice in Pennsylvania; but in some of the other states, it may have been, as it is at this day, still more relaxed. An experience of half a century recalls to me no instance of a departure from it before the present. The attorney-general has argued that there was in fact no departure, because the jury were not allowed to separate after the clerk had gone through the formality of stating to them the substance of the indictment, the plea, the issue, the submission of the prisoner to them for trial, and the nature of their function. But his statement is only an announcement of what has been done. A juror is charged with a prisoner as soon as he has looked upon him and taken the oath; for he cannot be withdrawn. The trial has commenced, and the prisoner stands before him as one of his judges. In this case, the jury were allowed to separate after they were impaneled and sworn. True, that took place with the prisoner's consent; but there is right, reason, and sound sense in Chief Justice Abbott's remark, in *Rex v. Woolf*, 1 Chit. 401, that he ought not to be asked to consent. Who dare refuse to consent,

when the accommodation of those in whose hands are the issues of his life or death are involved in the question? He would have to calculate the chances of irritation from being annoyed on the one hand, or of tampering on the other. The law is undoubtedly settled by precedent that a prisoner's consent to the discharge of a previous jury is an answer to a plea of former acquittal; but the instant a jury is discharged, the prisoner's life is no longer in their power; or if he should be the cause of their being sent back to protracted confinement, the value of a single chance in his wretched condition would disarm their resentment. Still, I think no consent of a prisoner, in the extremity of his need, ought to bind him.

It is ordered that the judgment be reversed, and that the prisoner remain committed to answer another indictment.

SEPARATION OF JURY DURING PROGRESS OF CRIMINAL TRIAL: See *Davis v. State*, 45 Am. Dec. 559, and note citing prior cases. In capital cases, it is not allowed: *McKinney v. People*, 43 Id. 65, with note discussing the subject at length; *State v. Hornsby*, 41 Id. 305, citing prior cases in the note. The principal case is cited on this point in *Commonwealth v. Thompson*, 4 Phila. 220. In *McCorkle v. State*, 14 Ind. 41, the principal case is cited to the point that the consent of the defendant to the discharge of a jury during the progress of a criminal trial is not a bar to another trial for the same offense. In *Commonwealth v. Costello*, 128 Mass. 90, the court hold that it is at least doubtful whether the consent of the court to the separation of a capital jury during the trial could cure the difficulty.

ECKEL v. MURPHEY.

[15 PENNSYLVANIA STATE, 433.]

INDEBITATUS ASSUMPSIT MAY BE MAINTAINED by a party who has fully discharged the stipulations of a written contract; but where his performance is incomplete, he is driven to his action upon the contract itself, with averments excusing his non-performance.

PROMISSORY NOTE AT MATURITY PRESENTS CONTRACT PERFECT IN ALL ITS PARTS when standing alone, and is competent to sustain an action at law unsupported by any other fact.

UNLIQUIDATED DAMAGES INCURRED BY DEFENDANT, THROUGH PLAINTIFF'S SUBSEQUENT NON-COMPLIANCE with some or any of his covenants, may be introduced as an equitable defense to a note "previously given to plaintiff by defendant, according to agreement, in part payment on the unfulfilled contract.

MEASURE OF DAMAGES FOR BREACH OF CONTRACT is the pecuniary loss suffered therefrom.

LOSS OF COMMERCIAL CREDIT IS NOT ESTIMATED AS DAMAGES for breach of contract, unless it immediately connects itself with some tangible pecuniary loss of which it was the cause.

VENDOR CONTRACTING TO DELIVER GOODS AT DEPOT OF COMMON CARRIER cannot excuse non-performance by proving that the vendee did not furnish a place at the depot for the deposit of the goods, as this is the vendor's duty.

THIS was an action on a promissory note and a count for goods sold and delivered, brought by Eckel, the payee, against Murphey, the maker. Eckel had agreed to deliver all the coal mined and taken out of his colliery during a certain period; and Murphey agreed to pay a certain sum per ton therefor, and authorized Eckel to draw weekly drafts upon him, one of which advances is the note sued on. Plaintiff proved his note, and rested. Defendant introduced the contract and an account current sent him by Eckel, wherein it appears that the advances made by Murphey to Eckel, among which is the note sued on, which amounted to about seven hundred and fifty dollars, exceed the value of the coal received by about five hundred and fifty dollars. A letter from Eckel to Murphey informed the latter that he was unable to send any more coal. Defendant introduced other breaches of the agreement, such as that the coal furnished was of inferior quality to that stipulated for in the agreement, and that coal had been sold to other parties. There was testimony that although difficulties were met with by Eckel in working his coal veins, considerably more coal could have been supplied. Defendant was allowed to introduce testimony to the effect that his credit was injured by plaintiff's non-performance of his agreement; that he entered into extensive contracts, which he was on that account unable to perform; and that the protest of the note in suit had impaired his credit, for the purpose of defalking the damages sustained. Plaintiff excepted to the admitting of this evidence. Part of the contract for the delivery of the coal was that if plaintiff could not obtain carriage by a railroad mentioned, he might send the coal by Navigation cars, and deliver it at their landings at Schuylkill haven. Plaintiff offered to prove that he could not obtain a sufficient number of cars of the first railroad mentioned, to enable him to ship the coal as fast as necessary, and that defendant furnished no place for a deposit of the coal at the landings of the Schuylkill Navigation Company. The court refused to admit this evidence, and plaintiff excepted. This was the third bill of exceptions. The court instructed the jury that the plaintiff could not recover in this form of action, unless he showed that he had performed the contract on his part. Plaintiff excepted to the charge, and error was assigned.

Campbell and Bannan, for the plaintiff in error.

Hughes, for the defendant in error.

By Court, BELL, J. The instruction given to the jury below, that the plaintiff could not recover without showing a complete performance on his part of the written agreement of January, 1848, is professedly founded on the doctrine declared in *Algeo v. Algeo*, 10 Serg. & R. 235, and *Harris v. Ligget*, 1 Watts & S. 301. But in the hurry almost necessarily attendant upon a trial at bar, the court overlooked a very important feature of the present controversy, broadly distinguishing it from the authorities cited. In those cases, the somewhat anomalous rule was recognized, that where a party had fully discharged the stipulations of a written contract for services to be rendered, he may recover in *indebitatus assumpsit*, using the written agreement as evidence; but where his performance is incomplete, he is driven to his action upon the contract itself, with averments excusing his non-performance. The reason given is, that full performance of a contract creates a moral duty to compensate it, independently of the obligation of the contract itself, while a deficient performance gives birth to no corresponding liability. Or in other words, from the complete discharge of such a covenant springs an implied undertaking to pay for the benefits conferred, but the law will infer no such promise from half performance. In the latter case, the difficulty in sustaining the common count for work and labor is found in the absence of a consideration adequate to raise a promise, and consequently the very foundation of *indebitatus assumpsit* is wanting.

But no such obstacle lies in the way of the present plaintiff. His action is based upon a legal instrument, which in itself imports a sufficient consideration, and of itself furnishes a cause of action without reference to extraneous considerations or averments. By the mere proof of its execution, he vindicates his right to come into court, and may call upon his adversary to answer. Unlike the implied promise deriving its efficacy from a distinct written agreement, and which must, therefore, be considered in reference to something *dehors*, a promissory note, standing alone, presents a contract perfect in all its parts, and competent to sustain an action at law unsupported by any other fact. In the one case, the complaining party must prove complete execution of an independent agreement in order to raise a consideration; in the other, he is driven to no such

necessity. Nor is this difference a merely technical one; it is a distinction of substance, suggested by the diverse character of the contracts. In the former instance, the obligation of payment depends altogether upon subsequent performance; in the latter, the undertaking is completed by mere lapse of time. *Prima facie*, therefore, he who draws a bill or makes a note subjects himself to an action upon the expiration of the stipulated credit, and this liability is sufficient for this plaintiff's purpose in the first instance. The defendant has expressly promised to pay a certain sum of money on a particular day. He cannot wholly avoid this promise by showing that it originated in another contract, unless, indeed, this involves a total failure of consideration.

Another objection, nearly allied to that just disposed of, was presented on the argument. It was suggested that as the note in suit may be regarded as a part of an entire contract, there can be no recovery upon it without proof of faithfulness on the part of the plaintiff, or that strict performance was prevented by the defendant, according to *Shaw v. Turnpike Company*, 2 Penr. & W. 454; *Martin v. Schoenberger*, 8 Watts & S. 369, and other adjudications of that class. But, apart from the nature of the contract imported by a promissory note, already considered, and which, in connection with a similar objection, was glanced at in *Foulke v. Harding*, 13 Pa. St. 242, the answer is, that by the terms of the original agreement between these parties, the coal furnished by the plaintiff was to be paid for weekly, by drafts drawn on the defendant, for which it is understood the present note, with others, was substituted. It is thus made manifest the vendor was not to await payment until his entire contract was fulfilled. Periodical payments were expressly stipulated for, and as this note was given and accepted in pursuance of this stipulation, the demand of payment is strictly in accordance with the agreement. This being so, the difficulty is to know how this demand may be resisted on the ground of subsequent failures by the plaintiff. As the law on this subject was anciently understood, such a defense would not, perhaps, have been listened to. But under the liberal rule first distinctly recognized by our cases of *Steigleman v. Jeffries*, 1 Serg. & R. 477 [7 Am. Dec. 626], and *Heck v. Shener*, 4 Id. 249 [8 Am. Dec. 700], injuries inflicted by distinct violations of the original contract, as springing from the same transaction, may be introduced by way of equitable defense, to be compensated in damages; or under our recent decisions the unliquidated damages incurred by

the defendant, through the plaintiff's non-compliance with some or any of his covenants, may be defalked from the amount of the note.

But the measure of these damages is the pecuniary loss suffered by the vendor of the coal, from its non-delivery according to the terms of the contract. The injury inflicted by a loss of commercial credit is not such as can be estimated by a common-law jury. It is, consequently, to be excluded from consideration when ascertaining the extent of damages to be assessed, unless, indeed, it immediately connects itself with some tangible pecuniary loss, of which it was the cause. It is the pecuniary injury, the actual deficit in dollars and cents, which is to furnish the standard by which the set-off of the defendant is to be measured; but I can easily conceive that, as explanatory of this, a failure of credit occasioned by the misconduct of the vendor may be introduced in evidence. But bald proof of a loss of credit, such as was received under exception at the trial, is obnoxious to objection, as tending to mislead the jury by vague and unsubstantial conjecture of injury.

The proposed evidence mentioned in the third bill of exceptions was properly enough rejected, for the simple reason that it was the duty of the plaintiff, and not of the defendant, to find a place of deposit for the coal at the navigation company's landings.

Judgment reversed, and a *venire de novo* awarded.

LOSS OF COMMERCIAL CREDIT AND FUTURE PROBABLE PROFIT, when estimated as damages: See *Donnell v. Jones*, 52 Am. Dec. 194, and note referring to prior cases.

MEASURE OF DAMAGES WHICH MAY BE RECOUPED BY VENDEE when vendor fails to perform part of the contract: See *Cole v. Swanston*, 52 Am. Dec. 288, and note citing prior cases.

MEASURE OF DAMAGES FOR BREACH OF CONTRACT TO DELIVER GOODS: See *Furlong v. Polleys*, 50 Am. Dec. 635, citing prior cases in the note.

INDEBITATUS ASSUMPSIT WILL NOT LIE IN CASE OF PARTLY PERFORMED WRITTEN CONTRACT: See *Rankin v. Darnell*, 52 Am. Dec. 557, and note citing prior cases. In *McManus v. Cassidy*, 66 Pa. St. 262, the principal case is cited to the point that when a special contract has been fully performed, the party having fully performed it may maintain *indebitatus assumpsit*, and declare in the common counts for work, labor, or services performed.

UNPAID PROMISSORY NOTE AT MATURITY CONSTITUTES COMPLETE CAUSE OF ACTION: See *North Bank v. Abbot*, 25 Am. Dec. 334.

DELIVERY PRECEDENT TO RECOVERY ON CONTRACT OF SALE, WHEN.—In *Dey v. Dox*, 24 Am. Dec. 137, it is held that where the goods are to be delivered before payment, the vendor may sue without averring and proving performance on his part.

HARLAN v. HARLAN.

[15 PENNSYLVANIA STATE, 507.]

REPLEVIN MAY BE MAINTAINED BY ONE HAVING RIGHT OF POSSESSION, whether he has ever had possession or not, and whether his property in the goods be absolute or qualified.

MACHINERY OF COTTON OR WOOLEN MANUFACTORY which is necessary to constitute it is a part of the freehold, and as such will pass by deed of the vendor conveying the land on which the manufactory stands, or by the deed of the sheriff who sells the real estate of the owner under execution.

FIXTURE WRONGFULLY DETACHED FROM FREEHOLD BECOMES PERSONAL PROPERTY OF OWNER OF SOIL, and he may, in general, maintain trover or replevin for the same.

TROVER OR REPLEVIN FOR FIXTURES REMOVED WILL NOT LIE against one in actual adverse possession of the land and claiming title thereto.

TITLE TO REALTY MAY BE TRIED INCIDENTALLY IN REPLEVIN or other transitory action.

TEMPORARY POSSESSION BY EXECUTION DEFENDANT OF PREMISES SOLD UNDER EXECUTION is not such an adverse possession as will defeat action of replevin brought by the purchaser at the sale to recover fixtures removed by the party in possession.

DECLARATIONS OF PLAINTIFF IN EXECUTION, who afterwards became the purchaser, disclaiming title to fixtures on the land sold under execution, do not estop him from asserting title to the fixtures in an action of replevin therefor; if his declarations were made in ignorance of his rights, and with no intention to relinquish his own property.

REPLEVIN, Josiah Harlan against Mary Harlan, Anne Harlan, and Edward Harlan, to recover certain machinery, to wit, a picker and a speeder. Edward Harlan was formerly the owner of the Glenville estate, on which was situated a woolen and cotton factory provided with machinery. Afterwards, he made an assignment for the benefit of his creditors to John Moss, who conveyed the land to Mary Harlan, and sold the machinery as personal property to Sarah Harlan. Sarah continued the business of manufacturing under the management of Edward Harlan. She failed, and sold the machinery to Mary Harlan. The mill and machinery were then leased by Mary Harlan to Anne Harlan, who employed Edward Harlan as manager and continued the business. Mary Harlan owed Josiah Harlan a certain sum which was secured by two judgments. Under an execution issued on one of these judgments, the Glenville real estate, now belonging to Mary Harlan, was sold, and Josiah Harlan became the purchaser and received a sheriff's deed of the property. He soon after served notice on Mary and Anne Harlan to quit the premises in three months. About the time the levy was made on the real estate Mary

assigned for the benefit of her creditors to Pyle. Pyle sold the speeder, which is sought to be recovered herein, to a third party, but it was not removed from the mill at that time. Soon after the expiration of the three months mentioned in the notice to quit, the defendants removed from the land, but took with them all the machinery of the mill, which included the picker and speeder sued for herein. When they removed, plaintiff was in possession of the land, but Edward Harlan held the keys to the factory, and refused to deliver them to plaintiff when asked to do so. The question was, whether action would lie under the circumstances. An exception was taken by the plaintiff to an overruling of his objection to the admission of the testimony of Brinton Darlington, the sheriff who levied the execution. He testified that the plaintiff had told him to levy on the real estate, and when asked if there was no personal property, had said that the machinery had been assigned to Pyle. Plaintiff also told him that he as sheriff had nothing to do with the machinery or other personal property. Plaintiff excepted also to the charge of the court, and the verdict being for the defendants, brought error. The points relied upon appear in the opinion.

Lewis, for the plaintiff in error.

W. Darlington, for the defendants in error.

By Court, ROGERS, J. It is well settled as a general principle, that in Pennsylvania, replevin lies wherever one man claims goods in the possession of another, and this, whether the claimant has ever had possession or not, and whether his property in the goods be absolute or qualified, provided he has the right of possession: *Weaver v. Lawrence*, 1 Dal. 157; *Shearick v. Huber*, 6 Binn. 3; *Woods v. Nixon*, Add. 134 [1 Am. Dec. 364]; *Stoughton v. Rappalo*, 3 Serg. & R. 562. It is also undisputed that in this state, the machinery of a cotton or woolen manufactory, which is necessary to constitute it, is a part of the freehold; and as such, will pass by the deed of the vendor conveying the land on which the manufactory stands, or by the deed of the sheriff who sells the real estate of the owner under execution. So if a fixture or other part of the real estate be wrongfully detached from the freehold, the thing detached becomes the personal property of the owner of the soil, and he may, in general, maintain trover or replevin for the same. Considering these general principles, the defendant contends that replevin is not the proper remedy, because it falls within the scope of other cases equally well

settled, beginning with *Mather v. Trinity Church*, 3 Serg. & R. 509 [8 Am. Dec. 663], recognized in *Baker v. Howell*, 6 Id. 476; *Brown v. Caldwell*, 10 Id. 114 [13 Am. Dec. 660]; that replevin is not the proper action to try title to land. In *Mather v. Trinity Church*, it is ruled that trover for stone and gravel from land does not lie by one who has the right of possession against the person who has the actual adverse possession of the land and sets up title to it. It will be remarked that it is not the actual possession, but it is the actual adverse possession of a person who claims title to it, that is the criterion. The case is put on this ground by Chief Justice Tilghman and Justice Duncan, both of whom delivered elaborate opinions; a criterion from which none will dissent, when it is considered what inconveniences would arise from a contrary decision.

Baker v. Howell is a case of similar description, in which it is held that an action for money had and received would not lie for the price of sand, taken from a sand-bar to which both the plaintiff and defendant claimed title, and sold by defendant. Mr. Justice Duncan says an action of *assumpsit* for money had and received is not the form of action in which conflicting titles to land or the right of inheritance may be tried. To the same effect is *Brown v. Caldwell*, 10 Serg. & R. 114 [13 Am. Dec. 660]. In that case, it is ruled that replevin will not lie by one not in the actual, exclusive possession of land, whatever title he may claim, against one who is in the actual, visible, notorious occupancy and possession thereof, claiming the right for slates taken out of a quarry on the land. There Caldwell was in the actual possession of land containing a slate quarry, claiming it as his own, in fact ultimately adjudged to be his property. Brown replevied the slate after it was quarried, and the court decided, for reasons which are unanswerable, that ejectment, and not replevin, was the proper form to try the title. For similar reasons was the case of *Elliott v. Powell*, 10 Watts, 454 [36 Am. Dec. 200], ruled.

Powell v. Smith, 2 Watts, 127, is relied on by the defendant, and is supposed to decide the broad principle that an action of replevin cannot be maintained when the plaintiff can make title to the chattel only by making title to the land from which it was severed. That, as an abstract principle, cannot be sustained, for to maintain the suit it must in all cases be shown that the title to the soil, even as against a stranger, is in the plaintiff. It is because he owns the land from which it is severed that he is entitled to the chattel, and this surely must

be shown or conceded. Thus, in the case of unseated lands, you can sustain an action for timber manufactured into lumber by a trespasser, only by proving title to the land from which it was severed. This is too plain a proposition to need the aid of authority. The truth is, *Powell v. Smith* merely affirms the principle ruled in *Mather v. Trinity Church*, *Baker v. Howell*, *Brown v. Caldwell*, and other kindred cases. It is true there was a recovery in ejectment, but no *habere facias* had been issued, and consequently the possession of the defendant continued, as before, to be adverse. The remedy, therefore, was not replevin, but an action for mesne profits, or by writ of estrepement.

The question is, Does this case fall within the principle already adverted to, that replevin lies wherever one man claims goods in the possession of another? or is it included in the class of exceptions indicated in *Mather v. Trinity Church*, and other cases? I have no hesitation in saying it is embraced by the former. The property from which the picker and speeder were severed, on the acknowledgment of the sheriff's deed became *ipso facto* the estate of the plaintiff; and inasmuch as there were fixtures belonging to the mill, they became his property also. He had not only a fee in the premises, but he was entitled to the possession also; for it cannot be doubted that he was entitled to an action of ejectment, which is an action to try the right of possession, immediately after the acknowledgment of the deed. That he might have pursued a shorter mode, pointed out by the act of assembly, is nothing to the purpose. What is alone material is, that he had the title and the right to the possession, and there was no claim of title to the realty made by defendants. After the acknowledgment of the sheriff's deed, the plaintiff stood in the relation of *quasi* landlord, the owner, the tenant, if you please, holding over after the expiration of the term. Although the actual possession is in the defendants, yet there is, in the sense attached to it in the cases cited, no adverse holding, nor the semblance of a contest as to the title. The title never has been nor ever can be disputed by them. The mere assertion of a title would be nothing. The court looks to the substance, and where it appears that in truth it is a trial of title, then it is properly ruled that replevin is not the proper action, but that it must be tried in another form. Beyond, the cases do not go, nor does public policy require they should. As is said in *Elliott v. Powell*, 10 Watts, 453 [36 Am. Dec. 200], it is a mistaken supposition that title to real estate may not be inci-

dentally tried in a transitory action, much less that replevin can be maintained only when the plaintiff can make title to the chattel by making title to the land from which it was severed. In many cases, and indeed in all of this description, there is no other way of making title to the chattel but by proving plaintiff's title to the land, of which the following cases are examples: *Heath v. Ross*, 12 Johns. 140; *Higginson v. York*, 5 Mass. 341; *Player v. Roberts*, W. Jones, 243.

In the case of uncultivated land, as before said, possession can only be proved by proving title. Indeed, proof of possession itself is proof of title. To the same purport is *Wright v. Guier*, 9 Watts, 172 [36 Am. Dec. 108], and *Elliott v. Powell*, 10 Id. 455 [36 Am. Dec. 200]. Here, the evidence of title proved the right of possession, which was necessary to maintain the action. Having the right of possession, the temporary occupation of the premises is not such an adverse, hostile, notorious possession, claiming title, as will defeat the action. I have already remarked that the plaintiff was *quasi* landlord, the defendant tenant, and this brings the case within the principle ruled in *Farrant v. Thompson*, 5 Barn. & Ald. 826, and *Mooers v. Wait*, 3 Wend. 104 [20 Am. Dec. 667]. In the former, it is ruled that where certain mill machinery, together with a mill, had been demised for a term to a tenant, and he, without permission of his landlord, severed the machinery from the mill, and it was afterwards seized under a *fi. fa.* by the sheriff, and sold by him, no property passed to the vendee, and the landlord was entitled to bring trover for the machinery even during the continuance of the term. The question is distinctly put, whether, inasmuch as a man named Richard was tenant of the mill, and of course in possession under an agreement for a term, the plaintiff, as landlord, could maintain trover for the goods, his remedy being, as was contended, case for the injury to the reversion. The court decided the action could be maintained. The reason given by Abbott, C. J., is, that inasmuch as the chattels were part of the realty when separated from the mill, they would, as in the case of trees cut down by a tenant, revert to the landlord; and upon that principle, trover is maintainable by him. In this view of the case, Bayley, J., and Holroyd, J., concurred: *Mooers v. Wait*, 3 Wend. 104 [20 Am. Dec. 667], is also in point. There it is ruled that if a person entering into possession of uncultivated land, under a contract of sale, giving him the right of occupancy and reserving to the landlord the land as security for the purchase-money, cuts timber for other than farming pur-

poses, the timber severed becomes the personal property of the owner of the inheritance, who may maintain trover against the person in possession, though a *bona fide* purchaser under the occupant. Here, immediately the chattels, which were part of the realty, were severed from the freehold, they became personal property, and belonged to the plaintiff, thus giving him as owner, the right of replevin as against any person in whose possession they may be.

This is the principal question in the cause. It is not a question of form merely, but of substance, where the defendant, as whose property the estate is sold, is insolvent. It would be a dangerous precedent to let it be understood that an owner of real property, after his estate is divested, can, by his own unauthorized act, sever part of it, as for example, the machinery in a mill, or the timber growing on the land, and acquire title to it, so as to prevent the purchaser from asserting his title to the chattel itself. It is no answer, in case of insolvency, that the plaintiff may have his action for mesne profits by laying the spoliation specially in the declaration, or a special action on the case, or his writ of estrepement after the injury is done. In the case supposed, his remedy would be worthless. His only adequate remedy is by replevin, as owner of the chattel, after the severance from the freehold. Owning the estate, he is owner of the chattel, certainly as against a wrong-doer, in which light alone are the defendants to be viewed.

We see nothing in the testimony, either of the sheriff or the other witnesses, which estops the plaintiff from asserting his title to the machinery of the mill, if his declarations were made in ignorance of his rights. He appears to have labored under the common mistake that machinery in a mill was personal not real property. There is not a shadow of proof that he intended to relinquish his own property for the benefit of the defendants. If the real estate brought less in consequence of his mistaken notion of the law, that may have been a reason for setting aside the sale, but is of no moment whatever in this action.

REPLEVIN, WHAT TITLE NECESSARY IN PLAINTIFF: See *Knowlton v. Culver*, 52 Am. Dec. 156; *Britt v. Aylett*, Id. 282, and notes thereto referring to prior cases in this series. The rule of the principal case in this respect is cited and approved in *Boyle v. Rankin*, 22 Pa. St. 170.

POSSESSION OF DEFENDANT IN EXECUTION AFTER SALE THEREUNDER is presumably not adverse to purchaser at execution: *Chalfin v. Malone*, 50 Am. Dec. 525, and note citing prior cases. In *Brewer v. Fleming*, 51 Pa. St. 115, it is decided, citing the principal case, that mere temporary occupancy for

the purpose of taking off timber, by one having no other right of possession, is not such an actual possession as defeats the constructive possession which the law casts upon the owner. The principal case is cited to much the same effect in *Lehman v. Kellerman*, 65 Pa. St. 492.

MACHINES IN MILL ESSENTIAL TO BUSINESS CARRIED ON ARE FIXTURES: See *Despatch Line v. Bellamy M. Co.*, 37 Am. Dec. 203, and note citing prior cases on the general rule as to fixtures; *Voorhis v. Freeman*, 37 Id. 490. The principal case is cited on this point in *Overton v. Williston*, 31 Pa. St. 158; *Altmeese v. Hufsmith*, 45 Id. 128.

TITLE TO REALTY MAY BE TRIED INCIDENTALLY IN TRANSITORY ACTION: See *Elliott v. Powell*, 36 Am. Dec. 200. But such action cannot be maintained for fixtures removed against one in possession under a *bona fide* adverse claim of title: See Id., note, citing prior cases. The principal case is cited as recognizing this distinction in *Halleck v. Mixer*, 16 Cal. 579; *Page v. Fowler*, 28 Id. 610; S. C., 39 Id. 418. It is cited in *Green v. Ashland Iron Co.*, 62 Pa. St. 102, to the point that title to realty may be incidentally tried in a transitory action.

THE PRINCIPAL CASE CAME BEFORE THIS COURT AGAIN, and is reported in 20 Pa. St. 303.

GOLDER v. OGDEN.

[15 PENNSYLVANIA STATE, 528.]

TITLE TO PERSONAL PROPERTY DOES NOT PASS TO VENDER by sale thereof without delivery until the goods sold are specifically identified by the parties to the sale.

MERE INTENTION OF VENDOR TO DELIVER TO VENDER CERTAIN SPECIFIC GOODS is not a sufficient identification thereof to pass the title.

TRESPASS *vi et armis* by Ogden, assignee of Longstreth & Son, against Robert Golder and Henry Lelar, sheriff, for replevying from Longstreth & Son's store one thousand pieces of wall-paper. Prior to the suing out of the writ of replevin Golder had bought of Longstreth & Son, wall-paper manufacturers, two thousand pieces of wall-paper, and paid for the paper in full. On the day of the purchase and payment, one thousand pieces of the paper were delivered to Golder. It was at that time agreed that the remaining one thousand pieces of paper should remain at the store of Longstreth & Son until called for by Golder. Thereafter, Longstreth & Son made an assignment for the benefit of their creditors to Ogden, the plaintiff. About a month afterwards Golder and the sheriff, by virtue of a writ of replevin, took from the store one thousand pieces of paper of the same size and character as that bought by Golder and already delivered. Whereupon Ogden brought this action. It was established on the trial that the paper was taken from the cellar of the store, and that after one

thousand pieces had been removed only a few more pieces remained in the cellar which were of the same kind. And a salesman of Longstreth & Son testified that he was told by the firm of the sale to Golder, and that it was considered that Golder was to have his paper out of the lot in the cellar. He did not know that Golder had ever selected it, and he could not say that the identical pieces taken were set aside by the firm for him, but one thousand pieces of that lot of paper were always intended for him. There was no evidence that Golder had particularly designated the one thousand pieces which he should call for. The court below directed a verdict for the plaintiff, and defendant brings error.

G. Mallery, for the plaintiff in error.

T. B. Townsend, for the defendant in error.

By Court, GIBSON, C. J. Had the paper been sold in a separate lot, the ownership would have passed, though it contained a few pieces more than the number. The buyer would have taken the whole as a lot sold to him in gross. Or had the pieces been separated from the rest and pointed out to him as his two thousand, a small excess would not have vitiated the sale. So, if the bargain had been that they were to be counted before they were taken away. Such is the principle of *Dennis v. Alexander*, 3 Pa. St. 50; *Scott v. Wells*, 6 Watts & S. 357 [40 Am. Dec. 568]; and *Hutchinson v. Hunter*, 7 Pa. St. 140, which are less stringent than the English cases. But there was no evidence that the bargain had regard to a lot in gross, or any particular pieces. The only thing at all like it is the testimony of the salesman, who swore it was considered that the buyer was to have his paper out of the lot in the cellar, and that the paper there was intended for him; but the witness did not know that the buyer had selected it, or that the identical pieces had been set apart for him. Without separation, however, intention is nothing. The vendors might have changed it before delivery, and have taken other pieces of the proper sort from any other part of the store. Whether there were such, or from what part they took the pieces previously delivered, did not appear; but even had there been no other pieces on hand than those in the cellar, and no more than the exact number, they would not have passed without a specific act of appropriation, equivalent to a delivery in contemplation of law.

Judgment affirmed.

SALE OF PERSONAL PROPERTY IS NOT COMPLETE as long as anything remains to be done between the buyer and seller: See *Williams v. Allen*, 51 Am. Dec. 709, and note citing prior cases. Special identification and setting apart of articles sold is equivalent to delivery: *Jessett v. Lincoln*, 31 Id. 36; *Brasier v. Ansley*, 51 Id. 408. The principal case is cited on this point in *Scudder v. Werster*, 11 Cush. 579. A sale of a certain number of timber-trees growing upon land, to be chosen by the vendee, passes an assignable interest before election made: *McCoy v. Herbert*, 33 Id. 254.

CASES
IN THE
SUPREME COURT
OF
RHODE ISLAND.

CLEMENCE v. STEERE.

[1 RHODE ISLAND, 272.]

ACTION OF WASTE BY REVERSIONER AGAINST LIFE TENANT is provided for by statute in Rhode Island, and the liability of the life tenant therein, though very stringent, is to be fairly and reasonably enforced.

CONVERTING MEADOW INTO PASTURE BY LIFE TENANT IS WASTE in England, but not so in Rhode Island, unless detrimental to the inheritance and contrary to the ordinary course of good husbandry.

PERMITTING PASTURE TO BECOME OVERGROWN WITH BRUSH IS WASTE on the part of a tenant for life, in England, but not so in Rhode Island, unless there be such neglect in cutting the brush as a man of ordinary prudence would not permit.

LIFE TENANT CUTTING AND SELLING WOOD IS GUILTY OF WASTE, he having a right to cut wood only for fuel and repairs, but if the reversioner assents to the cutting and sale he cannot claim a forfeiture on their account, and if the estate is by will charged with the comfortable support of the tenant, and the wood cut and sold went for the tenant's support, that fact is to be considered in determining the question of assent.

CUTTING HOOP-POLES IS WASTE by a life tenant, unless that is the ordinary mode of managing the farm, but not otherwise.

LIFE TENANT IS NOT BOUND TO REPAIR HOUSE which is out of repair when received, if not reparable, or if the expense of repairing it would exceed its value; otherwise, if repairs would make it tenantable.

DESTRUCTION BY LIFE TENANT OF HOUSE NOT TENANTABLE IS WASTE, unless it be with the reversioner's consent; and the life tenant is liable even if the house be torn down without his permission after his leaving the premises.

REMOVAL OF CRIB ERECTED BY LIFE TENANT NOT ANNEXED TO FREEHOLD is not waste.

TEARING DOWN OLD AND UNSTABLE BARN WHICH IS IN DANGER OF FALLING and injuring the life tenant's cattle is not waste, unless its condition was due to the tenant's neglect to repair.

TEARING BOARDS FROM BUILDINGS AND DESTROYING FENCES is waste.

WASTE FORFEITS PART OF PREMISES WASTED, but by a destruction of the dwelling-house, the whole premises are forfeited.

DAMAGES MUST BE ASSESSED IN ACTION OF WASTE for the place wasted over and above the value of the place.

ACTION of waste. The defendant was devisee of a life estate in the premises under the will of W. C. Steere. The plaintiff, who was also executor of the will, claimed under a conveyance from a devisee of the reversion. The facts sufficiently appear from the charge of the court.

Browne, for the plaintiff.

Carpenter, for the defendant.

By Court, GREENE, C. J. This is an unusual form of action in our courts; but it is an action well known to the law, and established in our state by statute nearly two centuries ago. And it is a wise provision; for unless there were some such remedy provided, the owner of the reversion, having no right to enter upon the premises, would be left at the mercy of the tenant for life. Although very stringent, causing a forfeiture of the estate wasted, it was designed to promote good husbandry, and should be fairly and reasonably enforced. You are, therefore, to entertain no prejudices on account of the nature of the suit, nor on account of the relations of the parties. They should stand before you divested of everything calculated to move either sympathy or prejudice.

The question for you is, Has waste been committed in any or all the ways in which it has been charged? I will go over the charges separately.

The defendant is charged with having converted meadow land into pasture land. In England, this would be waste. But we are not to apply the English law too strictly. Our lands are, in many respects, cultivated differently from land in England; and this difference is to be taken into account. Here it is necessary to show that the change is detrimental to the inheritance, and contrary to the ordinary course of good husbandry. If in this case the change injured the farm, or was such a change as no good farmer would make, it was waste: Greenl. Cruise, tit. 3, c. 11, sec. 18; 3 Dane's Abr., c. 78, art. 5; *Harrow School v. Alderton*, 2 Bos. & Pul. 86.

It is said that the pastures have been permitted to become overgrown with brush. In England, that would be waste, but

you would not expect so high a state of cultivation in Burrillville as in England, or as in the vicinity of a populous city. There must be such neglect in cutting the brush as a man of ordinary prudence would not permit; and if there was in this case such neglect, it is waste.

Another item is the cutting and selling off the farm fifteen cords of wood. The tenant for life has a right to cut only so much wood as is necessary for fuel and repairs. Therefore to cut wood and sell it off the farm is waste, beyond a doubt. The defense set up is that the plaintiff assented to it. If he has assented, either before or after the cutting, he has no right to claim a forfeiture of the estate on that account. You will consider in connection with this point the relations sustained by the parties. This estate was charged with the comfortable support of the defendant. As owner of the reversion, the plaintiff is bound to provide for her; and as executor, the will obliges him to sell the estate for her maintenance if necessary. Now if the sale of the wood went for the support, and so relieved the estate of the charge for her support, this is a fact for you to consider in connection with other facts bearing upon the question of his assent.

Another charge is cutting hoop-poles. Hoop-poles are timber trees in the earlier stages of their growth. This would be waste, unless it is the ordinary mode of managing the farm. It may be as usual for tenants to cut hoop-poles, when of the proper size, as to harvest the potatoes or fruit; and it would be wrong to make that waste which would not be waste in an ordinary tenant for a term of years: *Greenl. Cruise*, tit. 3, c. 11, sec. 5, and note; 4 *Kent's Com.* 76, 77.

Then there is a charge not only for not repairing the house, but also for tearing it down. Now, in regard to the question of repairs, if the life tenant receives a house in such a state as not to be reparable, or so dilapidated that the expense of repairing would be beyond the value of the house, he is not bound to repair, and may leave it to its natural destruction. But if the house is such that repairs would make it tenantable, he is bound to make them. But in regard to the charge of tearing the house down, the fact that it was not tenantable is no excuse. Whatever may have been its value, the reversioner had a right to it. If he consented to the demolition, that indeed alters the case; and you are to look to all the circumstances of the transaction and the parties for the evidence of the consent. If the house was torn down after she left the

premises, and neither by her direction nor permission, she is responsible: Greenl. Cruise, tit. 3, c. 11, secs. 21, 30; 4 Kent's Com. 77; *Fay v. Brewer*, 3 Pick. 203.

She is charged with removing the crib. The defense is that it did not belong to the inheritance, that it was placed by the life tenant upon a rock and not affixed to the freehold. If this was the case, it is not waste. She is charged with tearing down the barn. This is an important part of the farm. The defense set up is that it was so old and unstable that she feared it would fall upon her cow. If there was any such danger she had a right to tear it down, unless its dilapidated condition resulted from her neglect to repair. There are also charges of tearing boards from the buildings and destroying the fences, which if proved amount to waste.

You will perceive that there are various portions claimed to be wasted. Waste in any particular place forfeits the place, as waste in the woods forfeits the woods, in the meadow forfeits the meadow. A destruction of the dwelling-house forfeits the whole place. You are to find the place forfeited where the waste was committed. And, in addition, you are also to assess the damages for the place wasted, over and above the value of the place.

Verdict for the plaintiff, in that there has been waste of hoop-poles in the pasture, with damages in the sum of twenty-five dollars.

WASTE, WHAT CONSTITUTES: See *Ward v. Sheppard*, 2 Am. Dec. 625; *Jackson v. Brownson*, 5 Id. 258; *White v. Wagner*, 7 Id. 674; *Findlay v. Smith*, 8 Id. 733; *Wilde v. Layton*, 12 Id. 91; *Duvall v. Waters*, 18 Id. 350; *Johnson v. Johnson*, 29 Id. 72.

HODGES v. NEW ENGLAND SCREW CO.

[1 RHODE ISLAND, 812.]

DIRECTORS OF CORPORATION ARE LIABLE AS TRUSTEES FOR FRAUDULENT BREACH OF TRUST, and equity has jurisdiction of such cases.

CORPORATION IS PROPER PARTY TO SUE DIRECTORS FOR FRAUDULENT BREACH OF TRUST in the first instance.

STOCKHOLDERS MAY SUE DIRECTORS FOR FRAUDULENT BREACH OF TRUST in their own names, if the corporation refuses to sue or is still controlled by the defendants.

DIRECTORS OF CORPORATION LENDING ITS INDORSEMENTS TO ANOTHER CORPORATION, with which it is connected in business, where they act in good faith and with sound discretion, are not personally liable therefor as for a breach of trust.

DIRECTORS OF CORPORATION ARE NOT LIABLE FOR VIOLATION OF CHARTER THROUGH MISTAKE, unless the mistake arose from the want of such care as an ordinarily prudent man takes of his own affairs; especially where the mistake occurs in a matter as to which the law is unsettled.

CORPORATION MAY INVEST IN STOCK OF OTHER CORPORATIONS in certain cases. As to whether it may do so with a view to becoming a permanent stockholder, is a question upon which the law seems to be unsettled.

CORPORATION IS NOT TRUSTEE FOR ITS STOCKHOLDERS with respect to its corporate property so as to be subject to the jurisdiction of a court of equity at the suit of a stockholder.

CASES RESPECTING EQUITY JURISDICTION OVER CORPORATIONS reviewed, *per* Greene, C. J.

CHARTER OF CORPORATION IS NOT CONTRACT except as between the state and the corporation; and where it makes the stockholders liable for corporate debts, the liability does not arise out of contract, so as to give a court of equity jurisdiction of suits by stockholders against the corporation.

EQUITY COURT HAS NO JURISDICTION TO DECREE SALE OF STOCK TAKEN BY ONE CORPORATION IN ANOTHER without authority from the charter, so as to dissolve the relation between the corporations at the suit of a stockholder.

BILL by stockholder in the New England Screw Co. against said corporation and certain of its directors charging the directors with various acts of fraud in taking stock in the Providence Iron Company; in concealing important business transactions from the plaintiff; in paying exorbitant prices for rods bought of the iron company; in diverting the funds of the corporation to the use of the iron company by loans of cash, notes, indorsements, etc.; in devoting their time principally to the concerns of the latter company, of which they were also officers; and in managing the affairs of both companies so as to reduce the value of the plaintiff's stock and force him to sell it at a loss. As a result of these various acts, it was alleged that the prosperity of the screw company had greatly declined, and the plaintiff was in danger of irreparable injury. The bill prayed that an account of losses, etc., be taken against the delinquent directors, and other relief, for a dissolution of the connection between the companies, and an injunction against any further proceedings in carrying on the iron company. The facts as to these various matters, as appearing from the bill, answer, and proofs, are more particularly stated in the opinion.

B. R. Curtis, Cozzens, and Bradley, for the plaintiff.

Ames and Jenckes, for the defendants.

By Court, GREENE, C. J. There are some questions raised in the present suit which we find no difficulty in deciding. We think the directors of the screw company are liable in equity,

as trustees, for a fraudulent breach of trust. The jurisdiction of a court of equity over such a case was affirmed by Lord Hardwicke in the case of *Charitable Corporation v. Sutton*, 2 Atk. 404, in 1742, and has been exercised both in England and in this country ever since. In the case of *Attorney-General v. Utica Insurance Company*, 2 Johns. Ch. 371, Chancellor Kent recognizes the jurisdiction as well settled. In *Robinson v. Smith*, 3 Paige, 222 [24 Am. Dec. 212], in *Cunningham v. Pell*, 5 Id. 607, the same doctrine is affirmed and acted on. So, also, by Vice-Chancellor McCoun, in *Verplanck v. Mercantile Insurance Company*, 1 Edw. 84. The cases on this point are so numerous that we deem any further reference unnecessary.

The primary party to sue for such fraudulent breach of trust is the corporation; because the corporation is the party injured: *Robinson v. Smith*, 3 Paige, 222 [24 Am. Dec. 212]. But if the corporation refuses to sue, the stockholders may sue in their individual names. So if the corporation be under the control of the guilty directors, the stockholders may sue: *Id.*; *Angell & Ames on Corp.*, 304, 305.

In the present case, the defendants, who are charged with the fraudulent breach of trust, are the directors of the corporation, and control its action. We think, therefore, that the present bill, so far as it seeks a remedy against directors, comes within the settled jurisdiction of the court, and that the plaintiff, under the circumstances, is the proper party to sue.

The main question in the case remains to be considered: Has the plaintiff proved the charges in his bill? The bill sets forth in detail charges of gross fraud and breach of trust by the directors, and a violation of the charter by the screw company; and if these charges are true, the defendants are justly answerable to this court for all the damages which the plaintiff has sustained.

In considering this part of the case, two questions arise: Did the directors commit the acts complained of? and if they did, were these acts done with the fraudulent design charged? Let us examine the facts.

In 1845 the screw company were desirous of enlarging their business, and obtained an amendment of their charter, under which they erected a rolling-mill, and carried on the business of rolling iron; and afterwards, finding this unprofitable, went into the business of making railroad iron, and carried on that business until it ceased to be profitable, which was in the latter part of the year 1847. The business was then suspended.

The rolling-mill establishment was then without employment. It had cost one hundred and fifty-five thousand dollars, and was discredited in the market by the unprofitable business which had been carried on there. In erecting the rolling-mill establishment, and in carrying on the business there, the screw company had incurred a heavy debt. Under these circumstances, the directors of the screw company formed the plan of purchasing the nail machine and patent for making wrought nails, and of forming a new company, who were to become the purchasers of the rolling-mill and works, and patent and nail machine, and to carry on the business of making wrought nails. The screw company were to sell their nail machine and patent and rolling-mill, to the new company at cost, being one hundred and eighty-two thousand dollars, and to receive eighty-two thousand dollars in money, and the balance, being one hundred thousand dollars, in the stock of the new company. The whole capital of the new company was to be three hundred thousand dollars, to be divided into six hundred shares of five hundred dollars each, of which the screw company were to take two hundred shares, provided two hundred shares were taken by others and the company organized in three months.

One great object of the directors, in making this arrangement, was to effect a sale of their rolling-mill upon advantageous terms, and to realize from the sale in order, partially, at least, to relieve themselves from debt.

Another object was the anticipated profits of the new business. The immediate effect of the arrangement was that the screw company received eighty-two thousand dollars in cash for their rolling-mill and nail machine and patent, and still retained, as a stockholder in the iron company, one third of the same property, the other subscribers to the iron company putting their money against the rolling-mill of the screw company at cost.

The plaintiff, although he objected to the purchase of the nail patent and machine, in the first instance, yet afterwards acquiesced in and approved of the measure. And the evidence shows the directors had strong reasons to believe the purchase an advantageous one. Neither did the plaintiff object to the new company, and to the taking stock therein by the screw company, but he wished the stock, when taken by the screw company, to be divided among the stockholders, and he was not willing that the stock should be taken, except upon these terms.

This conduct of the plaintiff shows he considered the plan of the directors a judicious one, and for the interest of the screw company, for whether the stock were held by the screw company as such, or by the stockholders of that company individually, the business and profits of the iron company would be the same.

The answer states the result of the formation of the iron company and the sale of the rolling-mill has been to diminish the liabilities of the screw company to the amount of fifteen thousand dollars below what they would otherwise have been.

Viewing the plan of the directors, therefore, as a mere business arrangement, and aside from the question of power under the charter, we think it was judicious, and for the interest of the screw company. Certainly, we cannot say they acted without ordinary care and discretion, and least of all, that they had in view the fraudulent design of reducing the value of the plaintiff's stock in the screw company, in order to purchase it at their own price. And we are the more confirmed in this conclusion, when we recollect that the directors owned a large majority of the capital stock of the screw company, and could not reduce the plaintiff's stock without at the same time, and in the same proportion, reducing the value of their own.

The reason given by the directors for not dividing the stock in the iron company among the stockholders of the screw company, in conformity to the wishes of the plaintiff, is, that the screw company had incurred a heavy debt by the erection of a rolling-mill and the business carried on there, and they thought the consideration received for the sale ought to be held for the payment of that debt.

We do not see anything unreasonable or improvident in this—certainly nothing to sustain the charge of fraud imputed in the plaintiff's bill. It does not appear that the directors sought or secured to themselves any benefit or advantage which was not common to all the other stockholders in the screw company.

The bill charges the defendants with lending the indorsements of the screw company to the iron company. The answer gives the following account of this matter: That the iron company have not been able to complete and put in operation their machinery and works as soon as they expected; that in anticipation of having their works in operation at an earlier period, the iron company purchased a stock of coal and iron

proportioned to the full capacity of their works, and owing to the delay in getting them in operation, the notes given for the same became due before the stock could be manufactured and put in market; that in order to meet the accruing liabilities, the iron company were obliged to borrow money from the banks, and as the rules of the banks require an indorser, the iron company applied to the screw company and to the other stockholders to indorse their paper for the above purpose. This indorsement of the paper of the iron company by the screw company was considered by the directors as for the interest of the screw company, that company owning so large an amount of the stock in the iron company, and being so largely interested in the success of its business.

The directors were individually liable upon the indorsements as stockholders in the screw company, and to a much larger amount than the plaintiff. The other stockholders in the iron company took the same view of their interest in this particular, and indorsed the paper of the iron company to an amount corresponding to their interest in the stock.

If the stock taken by the screw company had been divided among the stockholders, we may fairly presume they would, individually, have indorsed the paper, which has now been indorsed by the screw company.

In relation to these indorsements, we may say, as we have said of the notes of the screw company that it is not a question of power, but of good faith and sound discretion on the part of the directors. We think the directors have acted in this matter in good faith and with sound discretion.

Another question remains to be considered, and that is, Are the directors personally liable for taking stock in the iron company, not upon the ground of any fraud in fact on their part, but upon the ground that they violated the charter of the screw company in so doing? In the view we take of the facts upon this part of the case, it is not necessary for us definitely to decide whether the act under the circumstances was a violation of the charter of the screw company; for, although the charter may have been violated, still we do not think the directors ought to be personally responsible under the circumstances. We prefer to decide so important a question upon a proceeding against the corporation when that is the question directly put in issue. In considering the question of the personal responsibility of the directors, therefore, we shall assume that they violated the charter of the screw company. The

question then will be, Was such violation the result of mistake as to their powers? and if so, did they fall into this mistake from want of proper care, such care as a man of ordinary prudence practices in his own affairs? For, if the mistake be such as with proper care might have been avoided, they ought to be liable. If, on the other hand, the mistake be such as the directors might well make, notwithstanding the exercise of proper care, and if they acted in good faith and for the benefit of the screw company, they ought not to be liable.

It was contended by the counsel for the plaintiff that the ground of innocent mistake could not avail the defendants, because they had not set it up in their answer. But the answer does allege that the directors, in all they have done in managing the affairs of the screw company, have acted in good faith and to the best of their ability, skill, and discretion, for the profit and benefit of that company. This necessarily excludes the idea of a willful violation of charter, for it is impossible that these defendants could have truly and honestly sworn they had acted in good faith towards the screw company in a matter in which they had knowingly and willfully violated their charter. It is worthy of observation, too, in this connection, that the bill nowhere charges that the directors knew the act complained of was a violation of their charter. It charges that the act was done with the design to defraud the plaintiff, and that it was a violation of the charter of the screw company; and to this charge the answer is responsive.

Let us look at the circumstances under which the directors subscribed for this stock. At the time of the transaction, no case in which this question of authority was decided or considered had occurred, either in England or this country. The law on the subject cannot be considered as known and settled.

There are large classes of corporations in Rhode Island and the other states, which may and do rightfully invest their capital in the stock of other corporations; such, for instance, as religious and charitable corporations, and corporations for literary and scientific purposes. So insurance companies may rightfully invest their capital in the stock of other corporations, such as banks and railroads, and the like. Nor have we any doubt that the screw company might have rightfully taken this stock in the iron company, in payment for their rolling-mill, if it had been taken with a view to sell again and not permanently to hold it.

Again, it is to be observed that the directors were not investing the dividends of the screw company in the stock of the

iron company. They had on hand an unsalable rolling-mill, and they owed a heavy debt for it, and one great object in taking the stock in the iron company was to realize for the rolling-mill, and in part pay thereby the debt.

The business, too, of the iron company was of a kindred nature with that carried on by the screw company; and so far as the manufacture of rods was concerned, intimately connected with the business of the screw company.

It was like the case of a corporation for printing calicoes taking stock in the corporation which manufactured and supplied the print cloths. It deserves, also, to be remarked in this connection that this question of power never seems to have been raised by the directors or the stockholders in either company, or by the plaintiff himself, until the present bill was filed. Under these circumstances, and giving proper weight to the answers of the defendants, we feel bound to say that in subscribing for this stock, they have acted in good faith, and with as much care and discretion as a man of ordinary prudence exercises about his own affairs, and that, if they have fallen into a mistake in regard to their powers, it was an innocent mistake, for which they ought not to be held answerable. We have in Rhode Island a large number of corporations, whose affairs are managed by directors, who are generally large stockholders and act without compensation. If the innocent mistakes of these gentlemen, in cases where the law was unsettled or unknown, is to subject them for damages, great injustice would be done. The law requires of them care and discretion, such as a man of ordinary prudence exercises in his own affairs; and if they practice this, and nevertheless make a mistake, the law does not hold them answerable.

The plaintiff's counsel have referred to the amendment of the screw company's charter of October, 1845, as showing that the directors must have known they had no power to take stock in the iron company. There were two objects obtained by that amendment, which could not be obtained without it; one was the right to increase the capital stock to three hundred thousand dollars, and the other was the right to carry on the business of manufacturing and rolling iron, under the name of the New England Iron Company. The original charter was for manufacturing purposes, which we think clearly includes the power to manufacture and roll iron; but it must be done as the original charter stood, under the name of the screw company. The amendment, in effect, authorized them to adopt a

new name; but it did not confer any additional authority to manufacture and roll iron.

Neither do we feel ourselves justified in drawing any inference unfavorable to the defendants, from the fact that the screw company do not appear among the petitioners for the charter of the iron company. If the bill had stopped with the prayer for relief against the directors individually, there would have remained nothing more for us to consider in deciding the case. But it goes further, and prays for a dissolution of the union between the two companies, upon the ground that this union was a violation of the charter of the screw company. The bill does not pray for any specific mode of relief in this particular, but the counsel for the plaintiff contended that the proper mode of relief was to order a sale of the stock of the screw company, by a master of this court, and we will consider the case as if such specific relief had been prayed for.

The ground of the relief here prayed for is, that the corporation have violated their charter, and the decree is asked for against them upon the ground of such violation. The counsel for the defendants contend that this court have no power to try any such question or to administer any such relief.

In considering this question, it is important to take an accurate view of the facts. It is not a case where the majority of the stockholders have fraudulently violated the charter, for their personal advantage to the injury of the minority, nor is it a case of a willful violation of the charter. The majority acted in good faith, and under the belief that the charter authorized what has been done.

The question then is, whether in such a case this court has power, in a suit by a minority of the stockholders, to decree against the screw company a sale of their stock in the iron company, upon the ground that the screw company had exceeded their corporate powers in taking this stock. If so, under what head of equity jurisdiction does such a case fall?

The corporation are not the trustees of the stockholders, so far as the corporate property is concerned. A corporation may become a trustee, as an individual may, and as such would be subject to the ordinary jurisdiction of the court, in relation to the trust property. But the relation of corporation and stockholders does not imply a trust in the corporation.

It is true, the English court of chancery have exercised a control over charitable corporations in respect to breaches of trust, but the jurisdiction has been cautiously limited to cor-

porations of that character. Such was *Attorney-General v. Foundling Hospital*, 4 Bro. C. C. 165; S. C., 2 Ves. jun. 42. Such corporations are clearly trustees in respect to the charitable fund, for those who are entitled to the benefit of the charity.

But, in respect to a mere trading corporation like the screw company, we do not find any precedent, either in England or this country, for considering the corporate body as the trustees of the stockholders, and as such, subject to the general jurisdiction of a court of chancery, at the suit of a stockholder.

Let us examine the cases. In the case of *Attorney-General v. Utica Insurance Company*, 2 Johns. Ch. 371, Chancellor Kent reviewed, with careful research, the jurisdiction of a court of chancery over corporations up to that period. He came to the conclusion that in the state of New York all corporations were amenable to the supreme court, and to that court only, according to the course of the common law, for non-user or misuser of their franchise; and that the jurisdiction of a court of chancery over corporations was limited to the directors and officers of the corporation, in their character of trustees, for a breach of trust.

In the case of *Verplanck v. Mercantile Insurance Company*, 1 Edw. 84, the bill was by a stockholder against the company, charging, among other things, that the company had violated their charter, and praying for an injunction to restrain the further operations of the company, and for the appointment of a receiver of all its property and effects, with a view, after payment of debts, to a distribution among stockholders generally; in fact, to dissolve the corporation and wind up its affairs.

The vice-chancellor, while he affirmed the jurisdiction of the court over the directors, denied in the strongest terms the jurisdiction over the corporation. He held, if the parties stood in the relation of partners to each other, or as *cestuis que trust* and trustees, he should have no doubt as to the authority and duty of the court. But that the corporation were not the trustees of the stockholders; nor did the parties stand in the relative situation of partners, and that a court of chancery had no power to interfere with the chartered rights and franchises of a corporation at common law.

The same view is taken of the power of a court of chancery, at common law, over corporations, by Chancellor Sanford, in the case of *Attorney-General v. Bank of Niagara*, 1 Hopk. 354, and in the case of *Attorney-General v. Bank of Chenango*, Id. 598.

The case of *Verplanck v. Mercantile Insurance Company*, *supra*, to which we have referred, 1 Edw. 84, came before Chancellor Walworth, on appeal from an interlocutory order, before Vice-Chancellor McCoun's decision was made: S. C., 2 Paige, 438. Chancellor Walworth takes the same view of the common-law jurisdiction of a court of chancery over corporations for breach of charter as was taken in the cases which we have cited, and refers his authority to act in that case to the statute which confers it: Rev. Stat. of N. Y. 463. These cases show a clear understanding of the profession and the courts of New York that at common law no such jurisdiction existed in a court of chancery. And this authority is entitled to the more weight, because, from an early period in her history, a large chancery jurisdiction has existed in that state, and has been most ably administered.

The only English case we have been able to consult, which is an authority for this jurisdiction, is the recent case of *Salomons v. Laing*, 12 Beav. 339, decided at the rolls.

The bill in that case charged that the directors in the South Coast company were guilty of a willful violation of the charter of that company, in taking stock in the Portsmouth company, in their names, as trustees of the South Coast company, and paying therefor with the funds of the South Coast company.

The bill, among other things, prayed that the directors of the South Coast company might be decreed to have purchased the stock in the Portsmouth company on their own account, and not as trustees of the South Coast company; and that the directors of the South Coast company might be decreed to repay to that company the sums which had been taken from their funds to pay for the stock; and that the Portsmouth company might also be decreed to repay the same.

The defendants demurred to the bill. The opinion of the master of the rolls is to the effect that the directors were guilty of a willful violation of the charter of the South Coast company and a breach of trust, and ought to be held to have purchased the stock in the Portsmouth company on their own account, and ought to be decreed to repay to the South Coast company the amount which they had taken from the funds of that company to pay for the stock.

It will be seen that the relief sought was against the directors, and that relief was to be had by decreeing that the stock, which stood in their names as trustees, should be theirs in their own right, and that they should repay to the South Coast

company the amount which they had taken from the funds of that company to pay for the stock.

All this falls within the settled jurisdiction of the court. It is true, the master of the rolls holds the Portsmouth company also liable to refund, upon the ground that they knowingly participated in the breach of charter and trust of the South Coast company, in receiving the money for the stock. But in this respect the decree is against the Portsmouth company, as against any other party, whether corporation or individual, who has participated in a fraudulent breach of trust. It does not appear that any other relief was prayed for against the South Coast company, except to make them with the other defendants pay the costs. The South Coast company demurred to the original bill, but they do not appear by demurrer, or otherwise, to the amended bill.

It is proper, also, to bear in mind that the South Coast company was a railway company, having extensive powers under an act of parliament; and the master of rolls, in his opinion as reported, attaches importance to this circumstance. The bill also charged a willful breach of charter and trust, which were confessed by the demurrer.

The screw company are a trading corporation, having no power under their charter to interfere with the rights of others, any more than a partnership would have; their charter giving them a more convenient organization for the transaction of business than they could have as a copartnership, and nothing more. In the present case, too, all that has been done, has been done in good faith for the benefit of the screw company, and under the belief that it was lawful.

The counsel for the plaintiff referred to the clause in the charter of the screw company, which made the stockholders individually liable for the debts of the company, and endeavored to support the jurisdiction upon a supposed analogy between such a charter and a case of copartnership.

But a copartnership is a contract, and this is the ground of the jurisdiction. A charter is not a contract, except as between the state and the corporation. The powers and rights and duties of the corporation and of the stockholders are defined by charter; and the individual liability of the stockholders is the result of statute, and not contract. The same view is taken of this subject in the case of *Verplanck v. Mercantile Ins. Co.*, already referred to.

If this analogy were to hold, so far as to confer jurisdiction,

then this court would be bound to entertain suits generally, between the stockholders and the corporation, in respect to the corporate business and property and the management thereof, and the corporate franchises and a breach thereof—a jurisdiction wholly unknown both in England and in this country.

We do not say that where a member of a corporation is illegally excluded by the corporation from his share of the profits, and the amount cannot be ascertained, except by an account, which can only be had in equity, that a court of equity will not take jurisdiction, the remedy at law being incomplete. This was the case in *Adley v. Whitstable Company*, 17 Ves. 315.

The counsel for the plaintiff have referred to the observations of Lord Cottenham, as announcing the principles which guide intelligent, upright courts in discharge of the new duties, to which, from time to time, they are called by the onward movements of civilized society: *Taylor v. Salmon*, 4 Myl. & Cr. 134. But these observations should be taken with reference to the case then under consideration.

The point in this case was a matter of practice. The plaintiffs in the bill were the directors in a mining company, of which the members were so numerous that they could not be made parties. The question was whether, under such circumstances, the directors might not maintain the suit. The point was ruled in favor of the plaintiffs upon existing rules of practice. The court was exercising a known and settled jurisdiction, and the question was one of mere form.

In the present case, we are called upon to assume a jurisdiction heretofore unknown to the law. We readily agree, the law is progressive and expansive, adapting itself to the new relations and interests which are constantly springing up in the progress of society. But this progress must be by analogy to what is already settled, especially with reference to jurisdiction, which is not to be extended to new cases, unless they bear some analogy to what is already established.

Thus, when Lord Hardwicke first entertained a bill by a corporation against directors, he referred the authority of the court to the well-known head of equity jurisdiction over trustees, considering the directors in the light of trustees, and in that capacity answerable to the court for a breach of trust. Besides, corporations like the screw company and iron company are not of recent origin. They have existed to a limited extent in England for centuries, and to a great extent in this country for more than half a century. And yet no jurisdic-

tion like this has ever been exercised in this country, and none in England, unless the recent case decided at the rolls may be considered an authority in favor of the jurisdiction.

This power over corporations not being vested in this court by law, we think it far better and safer that the general assembly should confer it, if it be thought for the public good, rather than that we should assume it.

LIABILITIES OF DIRECTORS OF CORPORATIONS.—Directors of a corporation may, by a breach of official duty, become personally liable either to the corporation or its representative, or to the shareholders or some of them, or to creditors or other strangers having dealings with the corporation. This liability may arise under an express statute, or it may exist independently of any statute. In the former case, the statute is the measure of the liability, and the guide to the mode of enforcing it. In the latter case, the question as to when and how far and to whom the directors are liable, and as to how that liability is to be enforced, can be solved only by a correct understanding of the legal relation between them and the corporation, as shareholders, or creditors, as the case may be.

RELATION BETWEEN DIRECTORS AND CORPORATION, ITS SHAREHOLDERS OR CREDITORS.—The authorities upon this point speak a various language. The prevailing doctrine is that the directors are trustees for the corporation and the shareholders: *In re Cameron's Coalbrook etc. R. Co.*, 18 Beav. 339; *Williams v. Page*, 24 Id. 654; *Great Luxembourg R. Co. v. Magnay*, 25 Id. 586; *Imperial Mercantile Credit Ass'n v. Coleman*, L. R. 6 H. L. 189; *Poole, Jackson & Whyte's Case*, L. R. 9 Ch. Div. 322; *Kohler v. Black River etc. Iron Co.*, 2 Black, 721; *Robinson v. Smith*, 24 Am. Dec. 216; *Bank of St. Mary's v. St. John*, 25 Ala. 611; *European etc. R. Co. v. Poor*, 59 Me. 277; S. C., Thompson's Liabilities of Officers and Agents of Corp. 243; *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263; *Scott v. Depeyster*, 1 Edw. Ch. 542; *Cumberland Coal Co. v. Sherman*, 30 Barb. 553; *Butts v. Wood*, 37 N. Y. 317; *Bliss v. Matteson*, 45 Id. 22; *Shea v. Mabry*, 1 Lea, 319; Angell & Ames on Corp., sec. 312; and also for the creditors of the corporation, so far as the capital stock and corporate assets are concerned: *Bank of St. Mary's v. St. John*, 25 Ala. 611; *Lyman v. Bonney*, 118 Mass. 222; *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263; *Van Cott v. Van Brunt*, 2 Abb. N. C. 283; *Bliss v. Matteson*, 45 N. Y. 22; *Shea v. Mabry*, 1 Lea, 319. Mr. Morawetz, however, says that directors of a corporation are not technical trustees, either for the corporation or the stockholders, though often called so in practice, but are merely agents invested with wide discretionary powers in managing the affairs of the corporation, although in many respects their relation to the corporation is a fiduciary or trust relation: Morawetz on Priv. Corp., sec. 243. And there are several cases holding their relation to the corporation to be that of agents: *Ferguson v. Wilson*, L. R. 2 Ch. 77, per Lord Cairns; *Allen v. Curtis*, 26 Conn. 456; *Ryan v. Leavenworth etc. R. Co.*, 21 Kan. 365. In *Overend, Gurney, & Co. v. Gibb*, L. R. 5 H. L. 480, they are said to be agents or mandataries rather than trustees for the corporation. So, in *Spring's Appeal*, 71 Pa. St. 11, S. C., 10 Am. Rep. 684, S. C., Thompson's Liabilities of Officers and Agents of Corp. 233, they are declared to be mandataries rather than technical trustees. In *Gardiner v. Pollard*, 10 Bosw. 691, Robertson, J., also describes the relation of directors to shareholders as

being akin to that of bailment. He says: "There may be a confidential relation subsisting between a stockholder and a director, creating a certain duty by the latter to the former, or certain rights in the former which give the former a right to prevent or sue for the malfeasance of the latter. But I think it will be found that neither 'trustee' nor 'agent' expresses such relation, and that bailee of the capital of the corporation to perform specific duties therewith comes much more near to it."

In *Board of Commissioners v. Reynolds*, 44 Ind. 509, 8 C., 15 Am. Rep. 245, Worden, J., speaking upon this subject, uses the following language: "It is said very frequently in the books that the directors of a corporation are trustees of the stockholders, and that the relation of trustee and *cestui que trust*, with its consequences, exists between them. But these expressions must always be understood to have relation to the cases to which they are applied, and not to be of universal application. It may be conceded that in respect to the property of the corporation, whether it be land, money, securities, capital stock, or other property held by the corporation, and the management of its business, the directors are trustees for the stockholders. The action of the directors in respect to the property of the corporation must affect, to a greater or less degree, the stockholders generally. It has been generally, in such cases, or where the action of the directors has affected the whole body of stockholders, that the relation of trustee and *cestui que trust* has been held to exist."

In some cases it is laid down that the whole duty of directors is to the corporation, and that there is no trust, privity, or relation between them and the stockholders: *Allen v. Curtis*, 26 Conn. 456; *Smith v. Hurd*, 46 Am. Dec. 690. In *Peabody v. Flint*, 6 Allen, 56, it was held that the directors are trustees for the corporation, and that the corporation is itself a trustee for the stockholders. While it is admitted in *Poole, Jackson, & Whyte's Case*, L. R. 9 Ch. Div. 328, that directors of a corporation are trustees for the shareholders, it is said that they are not trustees for the creditors, and that the creditors have no greater rights against them than against other members of the corporation.

Mr. Thompson, in his able and exhaustive note on the liabilities of directors, lays down the rule to be, that at law the directors of a corporation are the agents of the corporation, and have no legal privity or other relation to the shareholders, but are to them mere strangers, while in equity they are regarded as trustees, "either of the corporation, as an artificial body, or of the aggregate body of the shareholders." See Thompson's *Liabilities of Officers and Agents of Corp.* 351, and cases cited. Upon a critical examination of all the authorities on this subject, it will be found that, although they seem to be exceedingly discordant, there is no substantial conflict. That the directors of a corporation, in their administration of its affairs, act in a fiduciary capacity, cannot be denied. Nor can it be denied that their duties and liabilities are those of fiduciaries. There is no material disagreement in the cases and text-writers on this subject, as to the measure of fidelity and care required of directors. All the authorities are in substantial accord as to the standard by which their liability is to be measured; they differ only as to who stand in such relation to them as to be able to enforce that liability. It is, perhaps, true, strictly speaking, that the only direct relation or privity is between the directors and the corporation as a distinct legal entity, and that the directors are trustees only for the corporation; but it cannot be questioned, in the light of the authorities, that the shareholders and creditors have such an interest in the enforcement of the trust that they may, in certain com-

tingencies, maintain suits for that purpose directly against delinquent directors.

DEGREE OF FIDELITY, CAPACITY, AND CARE REQUIRED OF DIRECTORS.—It follows from the fiduciary position occupied by directors of a corporation, whether regarded as strict trustees or not, that good faith in the management of the affairs committed to their charge is a primary requisite: *Bank of St. Mary's v. St. John*, 25 Ala. 611; *Smith v. Prattville Mfg. Co.*, 29 Id. 503; *Ryan v. Leavenworth etc. R. Co.*, 21 Kan. 365; *Shea v. Mabry*, 1 Lea, 319; *Vance v. Phoenix Ins. Co.*, 4 Id. 385. Or, as is said in some cases, they must exercise the highest and most scrupulous good faith: *Ryan v. Leavenworth etc. R. Co.*, 21 Kan. 365; *Vance v. Phoenix Ins. Co.*, 4 Lea, 385. This is, however, no more than to say that good faith is required of them. There cannot, in the nature of things, be degrees in good faith. It must be absolute, or it is not good faith. Directors of a corporation, to escape liability for mismanagement, must also, it is said, have reasonable capacity, and exercise their best judgment: *Vance v. Phoenix Ins. Co.*, 4 Lea, 385; *Hun v. Cary*, 82 N. Y. 74. They must, furthermore, exercise reasonable diligence or ordinary care—that care, in other words, which an ordinarily prudent man takes in the management of his own concerns: *Smith v. Prattville Mfg. Co.*, 29 Ala. 503; *Percy v. Millandon*, 8 Mart., N. S., 68; *Bank of Mutual Redemption v. Hill*, 56 Me. 385; *Scott v. Depeyster*, 1 Edw. Ch. 547; *Hun v. Cary*, 82 N. Y. 72; *Maisch v. Saving Fund*, 5 Phila. 30; *Shea v. Mabry*, 1 Lea, 319; Angell & Ames on Corp., sec. 314. In *Land Credit Co. v. Fermoy*, L. R. 5 Ch. 763, Lord Chancellor Hatherley says that it is the duty of directors “to be awake, and that their being awake would not exempt them from the consequences of not attending to the business of the company.” Each director is not required to be daily examining the transactions of the corporation, but it is enough if the usual means are employed to keep the officers and agents in check: *Maisch v. Saving Fund*, 5 Phila. 30. If, however, any fact comes to the knowledge of the directors calculated to awaken the suspicion of prudent men as to the fidelity of the subordinate officers or agents of the corporation, a higher degree of diligence and circumspection to guard against loss is required: *Percy v. Millandon*, 8 Mart., N. S., 68. In *Sperling's Appeal*, 71 Pa. St. 11, S. C., 10 Am. Rep. 684, S. C., Thompson's Liabilities of Officers and Agents of Corp. 233, one of the leading cases on this subject, it is held that directors of a corporation elected from the body of stockholders are not to be judged by the same strict standard as the agents or trustees of a private estate. And where a union-store association, instead of confiding the management of its affairs to its directors, imposes the same upon a managing agent, and the members knowing how the business is conducted, and that the by-laws are not strictly observed and obeyed, acquiesce in what is being done, the directors are not to be held to as strict an accountability as the directors of an ordinary moneyed corporation: *Henry v. Jackson*, 37 Vt. 431.

LIABILITY FOR BREACHES OF TRUST, NEGLIGENCE, MISCONDUCT OF CO-DIRECTORS, SUBORDINATES, ETC.—It may be laid down as a general rule that “there is no wrong or fraud which directors of a joint-stock company, incorporated or otherwise, can commit which cannot be redressed by appropriate and adequate remedies:” *Cross v. Sackett*, 16 How. Pr. 62; *Robinson v. Smith*, 24 Am. Dec. 216. From the fiduciary relation which directors of a corporation hold to the corporation itself and to its shareholders and creditors, and from the fact that they are held to strict good faith in their management of the corporate concerns, it follows that they are liable either to the corporation, or, in a proper case, to the shareholders or creditors for a fraudulent breach

of trust or misapplication of corporate funds, whereby a loss or injury results to the corporate assets: *Morawetz on Priv. Corp.*, sec. 246, note; *Angell & Ames on Corp.*, sec. 314; *Charitable Corporation v. Sutton*, 2 Atk. 400; S. C., *Thompson's Liabilities of Officers and Agents of Corp.* 226; *Kohler v. Black River etc. Iron Co.*, 2 Black, 721; *Ginurat v. Dane*, 4 Cliff. 260; *Robinson v. Smith*, 24 Am. Dec. 212; *Bank of St. Mary's v. St. John*, 25 Ala. 611; *Smith v. Poor*, 40 Me. 415; *Peabody v. Flint*, 6 Allen, 56; *Citizens' Loan Ass'n v. Lyon*, 29 N. J. Eq. 110; *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 389; *Cunningham v. Pell*, 5 Paige, 607; *Greaves v. Gouge*, 69 N. Y. 154; *Spring's Appeal*, 71 Pa. St. 11; S. C., 10 Am. Rep. 684; S. C., *Thompson's Liabilities of Officers and Agents of Corp.* 233; *Hazard v. Durant*, 11 R. I. 195; *Shea v. Mabry*, 1 Lea, 319. Said Lord Chancellor Hardwicke, in *Charitable Corporation v. Sutton*, 2 Atk. 400, S. C., *Thompson's Liabilities of Officers and Agents of Corp.* 226, speaking on this subject: "I will never determine that frauds of this kind are out of the reach of courts of law or equity, for an intolerable grievance would follow from such a determination." So they are liable for acts *ultra vires* in purchasing shares in a new corporation pursuant to a sham arrangement for the purpose of deluding the public into investing in the shares of such new corporation, whereby the funds of the original corporation are wasted: *Joint Stock Discount Co. v. Brown*, L. R. 8 Eq. 381. So for accepting unauthorized securities in payment for stock, they may be held liable for the full amount of the stock so paid: *Moses v. Ocoos Bank*, 1 Lea, 398. So they are liable for a loss of funds by gross negligence and inattention to duty: *Robinson v. Smith*, 24 Am. Dec. 212; *Neall v. Hill*, 16 Cal. 145; *Land Credit Co. v. Fermoy*, L. R. 5 Ch. 763. Mere imprudence, unless it amount to gross negligence, in the exercise of a rightful power, will not render the directors personally liable: *Overend, Gurney, & Co. v. Gibb*, L. R. 5 H. L. 480, affirming S. C., L. R. 4 Ch. 701; *Hedges v. Paquett*, 3 Or. 77. They are not liable for errors of judgment in the exercise of a discretion confided to them, unless so gross as to amount to gross negligence or to evidence of want of ordinary capacity, or to warrant the imputation of fraud: *Godbold v. Branch Bank of Mobile*, 11 Ala. 191; *Smith v. Prattville Mfg. Co.*, 29 Id. 503; *Percy v. Millandon*, 8 Mart., N. S., 68; *Van Dyck v. McQuade*, 86 N. Y. 45; *Hedges v. Paquett*, 3 Or. 77; *Henry v. Jackson*, 37 Vt. 431; *Overend, Gurney, & Co. v. Gibb*, L. R. 4 Ch. 701; S. C., L. R. 5 H. L. 480; *Turquand v. Marshall*, L. R. 4 Ch. 376. In *Spring's Appeal*, 71 Pa. St. 11, S. C., 10 Am. Rep. 684, S. C., *Thompson's Liabilities of Officers and Agents of Corp.* 233, it is said that they are not liable for mistakes of judgment even though so gross as to appear absurd and ridiculous, "provided they are honest, and provided they are fairly within the scope of the powers and discretion confided to the managing body." But this case no doubt states the doctrine altogether too favorably for the directors, and is not in accordance with the general current of authority: *Hun v. Cary*, 82 N. Y. 65. An error of judgment so gross as to appear ridiculous would certainly amount to evidence of either gross negligence or gross incapacity. Where the conduct of the business of the corporation is confided by the stockholders principally to a managing agent, and estimates of expenses, etc., made by the directors are reported to and discussed at the stockholders' meetings, errors therein will not be sufficient to render the directors liable, there being no fraud or gross negligence: *Henry v. Jackson*, 37 Vt. 431. Mistakes of law will not render the directors liable for a loss resulting therefrom if they act with reasonable care and diligence and in good faith, even though they might have avoided such mistakes by taking legal advice, which

they omitted to do: *Vance v. Phoenix Ins. Co.*, 4 Lea, 385. Where the directors of a corporation refuse to take steps at the request of a stockholder to prevent the collection of a tax upon the corporation, which they admit to be illegal, because of the many obstacles in the way of testing the legality of the tax, this cannot be deemed such an error of judgment as to exempt them from liability, but must be regarded as a breach of trust: *Dodge v. Woolsey*, 18 How. 331.

The directors of a corporation are not sureties to the corporation or its shareholders for the fidelity of a secretary or other subordinate officer appointed by them so as to be liable for his embezzlements or defalcations, if they have acted prudently and in good faith, and had no knowledge that he was untrustworthy: *Scott v. Depeyster*, 1 Edw. Ch. 513. And where on re-electing a secretary the directors do not take a new bond, supposing his bond for the previous term to continue in force, and a loss happens by the secretary's default, the directors are not liable where it appears that they are competent business men and have acted in good faith, although they did not take legal advice before acting: *Vance v. Phoenix Ins. Co.*, 4 Lea, 385. But where directors sanction a breach of trust by a subordinate officer, or by negligence and inattention enable him to divert corporate funds, they will no doubt be liable: *Angell & Ames on Corp.*, sec. 314; *Attorney-General v. Leicester*, 7 Beav. 176. So where they remove the safeguards which the by-laws throw around such subordinate officer, and permit him and his assistants to act as brokers for persons borrowing money of the corporation, and to become themselves borrowers without adequate security, and by these and other acts, the funds of the corporation are wasted: *Charitable Corporation v. Sutton*, 2 Atk. 400; S. C., *Thompson's Liabilities of Officers and Agents of Corp.* 228.

Certainly a director is not liable for a breach of trust, or act *ultra vires*, or improvident act, committed by his co-directors, where he was not present when it was decided upon, took no part in it, and had no knowledge of it, unless it appears that he might have prevented it by ordinary attention to his duties: *Sperling's Appeal*, 71 Pa. St. 11; S. C., 10 Am. Rep. 684; S. C., *Thompson's Liabilities of Officers and Agents of Corp.* 233; *Maiesch v. Saving Fund*, 5 Phila. 30; *Cargil v. Bower*, L. R. 10 Ch. Div. 502; *Joint Stock Discount Co. v. Brown*, L. R. 8 Eq. 381. So, where a director was present during only a part of the session at which an illegal or wrongful act was approved, and had no knowledge of the facts: *Land Credit Co. v. Fermoy*, L. R. 5 Ch. 763. But if he was present when an act was decided upon whereby the funds of the corporation were wasted, and did not oppose it, he will be liable: *Percy v. Millandon*, 8 Mart., N. S., 79; *Joint Stock Discount Co. v. Brown*, L. R. 8 Eq. 381. So, even though after the meeting he wrote a letter to one of his co-directors protesting against the proceeding, but did nothing further, though he afterwards attended other meetings of the board: *Joint Stock Discount Co. v. Brown*, *supra*. And where a director was present at a meeting at which an act constituting a violation of law or a breach of trust was voted on, and the minutes simply show that the act was "approved," without stating how the members voted, the presumption will be that he voted to approve it: *Van Dyck v. McQuade*, 86 N. Y. 38. Directors present at a meeting when certain loans not unusual in amount or character were reported by the executive committee, when in fact no loans had been made, but the money was drawn to buy in shares of the corporation for the purpose of raising the price of its stock, are not to be held liable therefor merely on account of neglect to inquire whether the security for the pretended loans was good: *Land Credit Co. v. Fermoy*, L. R. 5 Ch. 763. Ne

doubt a director who does not participate in a breach of trust may be held liable therefor where by gross non-attendance upon his duties he gives opportunity for its commission without opposition: *Charitable Corporation v. Sutton*, 2 Atk. 400; S. C., Thompson's Liabilities of Officers and Agents of Corp. 226. Ignorance on the part of directors of a corporation of a misappropriation of its funds by co-directors or other officers is no excuse or defense to a bill for an account thereof, where such directors possessed the means of knowledge: *Shea v. Mabry*, 1 Lea, 319. Directors who are themselves guilty of no fraud are not liable for a fraud committed by their predecessors occasioning a waste of assets to the injury of creditors or others: *Schley v. Dixon*, 24 Ga. 273. So where worthless paper discounted by a prior board is renewed by their successors, the latter are not liable under the Maine statutes: *Bank of Mutual Redemption v. Hill*, 56 Me. 385. And it seems that a director is not liable to the official liquidator under the English companies' act for neglect to recover promotion money improperly paid by his predecessors, though he knew of such improper payment: *In re Forest of Dean etc. Co.*, L. R. 10 Ch. Div. 450.

The fiduciary position occupied by directors forbids their speculating with corporate funds for their own benefit, or making a secret profit on transactions entered into by them on behalf of the corporation in buying or selling property, or the like, and if they do so, they may undoubtedly be compelled to account for the profits so made in a suit by the corporation, or its liquidators or assignee, or in a proper case, by the shareholders or others interested in the assets: *Redmond v. Dickerson*, 9 N. J. Eq. 507; *European etc. R. Co. v. Poor*, 59 Me. 277; S. C., Thompson's Liabilities of Officers and Agents of Corp. 243; *Ryan v. Leavenworth etc. R. Co.*, 21 Kan. 365; *Van Cott v. Van Brunt*, 2 Abb. N. C. 283; *York etc. R. Co. v. Hudson*, 16 Beav. 485; *Parker v. McKenna*, L. R. 10 Ch. 96; *Imperial Mercantile Credit Ass. v. Coleman*, L. R. 6 H. L. 189. As where a director stipulates for a secret profit on a contract let to a third person for building a part of a railroad for the corporation: *European etc. R. Co. v. Poor*, 59 Me. 277; S. C., Thompson's Liabilities of Officers and Agents of Corp. 243; *Ryan v. Leavenworth etc. R. Co.*, 21 Kan. 365. So, where on a purchase of land for the corporation a director induces the vendor to insert in the deed a larger price than was in fact paid, and pockets the difference: *Hichens v. Congreve*, 4 Russ. 564. So, where on a transfer of the business of the corporation to another company the directors secretly receive from the latter company a large sum as compensation for their trouble: *Gaskell v. Chambers*, 26 Beav. 360. So, where a director makes a profit by purchasing for the company property of which he is the secret owner: *Great Luxembourg etc. R. Co. v. Magnay*, 25 Id. 586. So, where directors purchase a steamboat as individuals, and sell it to themselves as directors at a large advance and at a price exceeding its real value: *Parker v. Nickerson*, 112 Mass. 195. So, where a bank director loans money of the bank at a stipulated interest, but upon a secret agreement that he is to participate in the profits of purchases of land to be made with the money: *Farmers' etc. Bank v. Downey*, 53 Cal. 466; S. C., 31 Am. Rep. 62. The fact that the articles of incorporation provide as a penalty upon a director for not disclosing any personal interest which he may have in contracts entered into on behalf of the company that his office as director shall be vacated, will not prevent a suit by the corporation or its representatives to compel such director to account for profits made on the transaction: *Imperial Mercantile Credit Ass. v. Coleman*, L. R. 6 H. L. 189. But a director may undoubtedly make loans or advances to a corporation, and take its bonds or debentures at the same rate

of discount allowed to other persons, without being liable for the discount; *Campbell's Case*, L. R. 4 Ch. Div. 470.

In analogy to the above doctrine, that directors must account for secret profits on transactions entered into by them on behalf of the company, it is held, also, that where directors receive from the promoters of a corporation, as a sort of bribe for voting to pay the promotion-money before the corporation is in condition to do business, a part of the money so paid, the official liquidator may recover it from them on the winding up of the company: *Madrid Bank v. Pelly*, L. R. 7 Eq. 441. So where the promoter agrees to indemnify certain directors named by himself against any liability for expenses, under articles empowering but not binding the directors to pay the expenses, and they vote him a certain sum for preliminary expenses, which he pays in calls on their shares, they are liable to repay to the official liquidator the money so allowed for preliminary expenses: *In re Englefield Collier*, L. R. 8 Ch. Div. 388. So where a director receives from the promoters certain paid-up shares for acting as director, he may be compelled to restore the shares and to account for their highest value during the period that he held them: *Nant-y-Glo etc. Co. v. Grave*, L. R. 12 Ch. Div. 738; or on the winding up of the company, such director may be held liable to the official liquidator to the full nominal value of shares so furnished him by the promoter: *Weston's Case*, L. R. 10 Ch. Div. 579; *Mitcalfe's Case*, 13 Id. 169; *Pearson's Case*, 5 Id. 336; *De Runvignes Case*, Id. 306; *Leeke's Case*, L. R. 6 Ch. 469; *Hay's Case*, L. R. 10 Ch. 593; *In re Diaderi*, L. R. 11 Eq. 242. See on this point, also, Thompson's Liabilities of Officers and Agents of Corp. 366-368, and cases cited and discussed.

Where the articles of incorporation, or statute under which a corporation is organized, require a director to be the owner of a certain number of shares to qualify him for the office, it is held that one who is elected and acts as director without taking the requisite number of shares will nevertheless, on the winding up of the company, be held liable as a contributory for the shares so required: *Stephenson's Case*, 45 L. J. Ch. 488; *Currie's Case*, 3 De G. J. & S. 367. So, where the shares are allotted to him without his knowledge, and without any application for them on his part: *Harward's Case*, L. R. 13 Eq. 80; *Miller's Case*, L. R. 3 Ch. Div. 661; S. C., 5 Id. 70. But where the director is entitled to the number of shares so allotted to him as paid-up shares for services rendered, he cannot be held as a contributory in respect of them: *Miller's Case*, *supra*. Where a director, within three days after issuance of the prospectus, gave written notice of his withdrawal from the corporation on the ground of misrepresentation as to its objects, and never acted as director, he was held not chargeable as a contributory for the qualification shares provided for in the articles of association subscribed by him, but which had never been applied for by him nor allotted to him: *Karuth's Case*, L. R. 20 Eq. 506. See also, substantially to the same effect, *Green's Case*, L. R. 18 Eq. 428. So where the articles of association provide that no person shall be qualified to be a director unless he has been the holder of a certain number of shares before his election, the election is deemed void, and his acting as director does not render him chargeable as contributory for the requisite qualification shares, when he has never applied for them: *Hamley's Case*, L. R. 5 Ch. Div. 705; *Barber's Case*, Id. 963; *Jenner's Case*, 7 Id. 132.

Directors of a bank voting extra compensation to one of their number for extra services as agent of the bank are not liable therefor if they act in good faith and for the benefit of the corporation, although the extra compensation is illegal and may be recovered back by the company from the director re-

ceiving it: *Godbold v. Branch Bank*, 11 Ala. 191. Where a director causes shares to be allotted to his infant children, it is a breach of trust under the English companies' act, and such director is himself liable for calls on those shares: *Ex parte Wilson*, L. R. 8 Ch. 45; S. C., 42 L. J. Ch. 81; S. O., 27 L. T., N. S., 597.

Other examples of acts, contracts, defaults, etc., for which directors may or may not be held liable will be mentioned in subsequent divisions of this note.

WHO MAY ENFORCE LIABILITY.—1. *Right of Corporation to Sue.*—For any misconduct or neglect of directors of a corporation, whereby the corporate assets are wasted or misapplied, there is no doubt that, as laid down in the principal case, the corporation is primarily the proper party to sue: *Cogswell v. Bull*, 39 Cal. 320; *Smith v. Poor*, 40 Me. 415. The corporation may maintain an action on the case at law against the directors individually for improperly obtaining and disposing of funds of the corporation: *Franklin Fire Ins. Co. v. Jenkins*, 3 Wend. 13. See also *Lexington etc. R. R. Co. v. Bridges*, 46 Am. Dec. 528. And where money is illegally paid to a director under a vote of his co-directors as extra compensation, the corporation may recover it in *assumpsit* for money had and received: *Branch Bank v. Collins*, 7 Ala. 95; *Godbold v. Branch Bank*, 11 Id. 191. Where a director of a bank borrows money from it in violation of a provision in its charter prohibiting the same under penalty of fine and imprisonment, the existence of such penalty will not preclude an action at law to recover the money: *Lester v. Howard Bank*, 33 Md. 558. A corporation may also maintain a suit in equity against directors to compel an accounting for a fraudulent breach of trust in appropriating funds to their own use, or to uses not authorized by the charter, or otherwise wasting them: *Robinson v. Smith*, 24 Am. Dec. 216; *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 389; *Citizens' Loan Ass. v. Lyon*, 29 N. J. Eq. 110; *Charitable Corporation v. Sutton*, 2 Atk. 400; S. C., Thompson's Liabilities of Officers and Agents of Corp. 226. So, though there may also be a remedy at law: *Citizens' Loan Ass. v. Lyon*, 29 N. J. Eq. 110. Though it is held that for a loss falling on the corporation beyond the loss of its capital, in the absence of fraud the only remedy, if any, is by an action at law for negligence, and a bill in equity will not lie: *Overend, Gurney, & Co. v. Gurney*, L. R. 4 Ch. 701. For an act *ultra vires* occasioning a waste of corporate funds by investing them in the stock of a new company pursuant to a sham arrangement for deluding the public into taking shares in the new company, the directors may be held liable as for a breach of trust, under a bill filed by the corporation: *Joint Stock Discount Co. v. Brown*, L. R. 8 Eq. 381. Where land purchased with corporate funds is conveyed to a director without the consent of the corporation, he may be compelled in equity to convey to the corporation or its grantee: *Buffalo etc. R. R. Co. v. Lampson*, 47 Barb. 533.

2. *Right of Assignee, Receiver, or Official Liquidator to Sue.*—The right of the official liquidator of a corporation, under the English companies' act, to recover profits secretly made by directors, and money or the value of shares received by way of a bribe from the promoters, has already been considered. Wherever corporate funds have been fraudulently misapplied by a director, the official liquidator may apply for an order requiring him to replace them: *In re National Funds Ass. Co.*, L. R. 10 Ch. Div. 118. Where directors, authorized to declare dividends out of profits, declare a dividend under a delusive and fraudulent balance-sheet, they will be liable to the official liquidator, on winding up, for the amount, but not where the company was engaged in the hazardous business of blockade-running, and in estimating the profits for

the purpose of declaring a dividend the directors reckoned certain assets at their full value, which afterwards, by the sudden termination of the war, became worthless: *Stringer's Case*, L. R. 4 Ch. 475. Directors of an insurance company declaring a dividend not warranted by the state of its funds were held to be liable to make good the amount, on winding up the company, in *Evans v. Coventry*, 25 L. J. Ch. 489. But where directors paid a larger dividend than they ought, by misrepresenting the state of the company's funds, they were held not to be liable to the official liquidator for the amount, in *Turquand v. Marshall*, L. R. 4 Ch. 376. Where directors of a bank impaired its capital by declaring a dividend, it was held that an assignee of the bank, under the Pennsylvania statute of 1824, could recover the amount of directors present at the meeting and not protesting: *Gunkle's Appeal*, 43 Pa. St. 13. The receiver of an insolvent savings bank cannot hold the directors liable, without the aid of a statute, for allowing interest on deposits when there are no net profits, earnings, or income, there being no fraud or bad faith: *Van Dyck v. McQuade*, 86 N. Y. 38. And a statute making the directors liable for allowing interest on deposits "in excess of the interest or profits earned," is penal, and to be strictly construed. Hence it is not to be held, in an action by the receiver, to mean "net profits," or to require the profits to have been received as well as earned: *Id.* Interest allowed on deposits in a savings bank is not a dividend within the meaning of the New York statute prohibiting the allowance of dividends except out of surplus profits: *Id.* In an action by the receiver in such a case, the fact that the vote allowing interest was not taken or recorded as required by law will be no defense where the directors would be otherwise liable, for they may waive that requirement. *Id.*

Where directors of a corporation report bad debts as good, they are not liable to the official liquidator unless it be shown that they knew the debts to be bad: *Turquand v. Marshall*, L. R. 4 Ch. 376. Nor can the liquidator hold them liable for a loan to one of their own number who dies insolvent, there being no fraud or bad faith, and the loan being within their discretion: *Id.* Nor for not calling a meeting of the shareholders, as required by the deed of settlement, upon the loss of one fourth of the capital, where, after a further loss, a meeting was called, and resolved to continue business: *Id.* Nor can he hold directors of the company as contributaries for their shares where they have, pursuant to resolution, paid up their shares and applied the money to certain notes of the corporation on which they were guarantors: *Poole, Jackson, & Whyte's Case*, L. R. 9 Ch. Div. 322.

A receiver of an insolvent bank may recover of a director notes of the corporation transferred to him by the cashier contrary to statute, or the money collected thereon: *Gillet v. Phillips*, 13 N. Y. 114. The assignee in bankruptcy of an insolvent corporation may maintain a bill against the directors for confederating together and diverting corporate funds to unlawful and improper purposes; *Gindrat v. Dane*, 4 Cliff. 260; but not for loss by mismanagement where they have acted in good faith and with ordinary diligence, nor for acts *ultra vires*, done under legal advice, where the statutes under which they acted were complicated and difficult to understand: *Spering's Appeal*, 71 Pa. St. 11; S. C., 10 Am. Rep. 684; S. C., Thompson's Liabilities of Officers and Agents of Corp. 233. Nor can such assignee maintain a bill to prevent a director who is a creditor, and has proved his claim, from sharing in the assets, on the ground that by reason of his non-compliance with certain statutes he is personally liable for the debts of the corporation: *Bristol v. Sanford*, 12 Blatchf. 341.

3. *Right of Stockholders to Sue.*—See generally, as to the right of stockholders to sue the officers of a corporation, or to call them to account, or to set aside their acts, the note to *Hersey v. Veazie*, 41 Am. Dec. 367. Neither a single stockholder nor any number of stockholders in a corporation can sue its directors at law for damages resulting from fraud, embezzlement, misfeasance, or gross negligence, whereby the property of the corporation is wasted and the stockholders are deprived of dividends, or their shares are rendered valueless: *Smith v. Hurd*, 46 Id. 690; *Allen v. Curtis*, 26 Conn. 456; *Gardiner v. Pollard*, 10 Bosw. 674; *Faurie v. Millandon*, 3 Mart., N. S., 476; Thompson's Liabilities of Officers and Agents of Corp. 379–381; *contra*: *Crook v. Jewett*, 12 How. Pr. 19. An individual stockholder can sue at law only for some special and peculiar damage resulting to him from the misconduct of a director. The reason is, that at law the directors are the agents of the corporation, and not of the shareholders: Thompson's Liabilities of Officers and Agents of Corp. 379. The corporation, therefore, is, as already stated, the proper party to sue. Besides, if one stockholder could sue the directors at law for wasting the assets, there might be as many actions as there were shareholders: *Smith v. Hurd*, 46 Am. Dec. 690. But if the corporation refuses or is unable to sue, the wrong is not to go without remedy. It is well settled, as stated in the principal case, that if, upon application to the corporation, it refuses to sue for a breach of trust by directors, causing a waste or misapplication of corporate assets, or if the corporation is still under the control of the same directors, one or more of the stockholders may sue in equity in behalf of themselves and others similarly situated: Thompson's Liabilities of Officers and Agents of Corp. 385; Angell & Ames on Corp., sec. 312; *Robinson v. Smith*, 24 Am. Dec. 217; *Neall v. Hunt*, 16 Cal. 145; *Allen v. Curtis*, 26 Conn. 456; *Colquitt v. Howard*, 11 Ga. 556; *Peabody v. Flint*, 6 Allen, 56; *Bayless v. Orne*, Freem. Ch. 161; *Greaves v. Gouge*, 69 N. Y. 154; *Spering's Appeal*, 71 Pa. St. 11; S. C., 10 Am. Rep. 684; S. C., Thompson's Liabilities of Officers and Agents of Corp. 233; *Hazard v. Durant*, 11 R. I. 195; *Mussina v. Goldthwaite*, 34 Tex. 125; S. C., 7 Am. Rep. 281; *Heath v. Erie R. Co.*, 8 Blatchf. 347; *Dodge v. Woolsey*, 18 How. 831; *Memphis v. Dean*, 8 Wall. 73; *Hichens v. Congreve*, 4 Russ. 562; *Ferguson v. Wilson*, L. R. 2 Ch. 77, per Lord Cairns; *Salomons v. Laing*, 12 Beav. 339. But such a bill cannot be maintained if no reason appears why the plaintiff might not have had the suit instituted by the corporation: *Foss v. Harbottle*, 2 Hare, 461; *Moxley v. Alston*, 1 Phill. 790. It must appear from the bill, in order to maintain it, that the corporation has been applied to, and has refused to sue, or that the directors to be sued still have control, so that such application would be unavailing: *Cogswell v. Bull*, 39 Cal. 320; *Brewer v. Boston Theatre*, 104 Mass. 378; *Greaves v. Gouge*, 69 N. Y. 154; *Hazard v. Durant*, 11 R. I. 195; *Memphis v. Dean*, 8 Wall. 73. And the corporation must be joined as defendant: *Colquitt v. Howard*, 11 Ga. 556; *Gardiner v. Pollard*, 10 Bosw. 674; *Greaves v. Gouge*, 69 N. Y. 154; *Hazard v. Durant*, 11 R. I. 195; *Charleston Ins. etc. Co. v. Sebring*, 5 Rich. Eq. 342; *Ferguson v. Wilson*, L. R. 2 Ch. 77. If the directors in office are charged with fraud, no application to them to bring suit in the corporate name need be shown: *Mussina v. Goldthwaite*, 34 Tex. 125; S. C., 7 Am. Rep. 281; *Heath v. Erie R. Co.*, 8 Blatchf. 347. So, where it is alleged that some of the defendants own a majority of the stock, and that the directors in office are colluding with them to continue them in control: *Brewer v. Boston Theatre*, 104 Mass. 378. But the bill does not show a sufficient excuse for not alleging an application to the corporation and a refusal to sue, where it avers merely that the present board of directors is composed "nearly, if not entirely," of the

same persons who committed the wrong: *Cogswell v. Bull*, 39 Cal. 320. If the objection that the bill does not show that the corporation has refused to sue, or is still under the defendants' control, is not made until the case reaches the appellate court, it is then too late: *Bulkley v. Big Muddy Iron Co.*, 29 Alb. L. J. 56 (Mo.).

If the act complained of is within the power of the directors, though done irregularly, and has been sanctioned by a majority of the stockholders, a minority stockholder suing for himself and others in like situation cannot maintain a bill therefor, there being no fraudulent or willful breach of duty: *Lord v. Governor etc. of Copper Mines*, 2 Phill. 740; *McDougall v. Gardiner*, L. R. 1 Ch. Div. 21; *Smith v. Prattville Mfg. Co.*, 29 Ala. 503. So, where the object of the bill is to enjoin an act threatened to be done, which belongs simply to the internal government of the corporation: *Moxley v. Alston*, 1 Phill. 790. But where the act done or threatened to be done is an act *ultra vires*, or a breach of trust which cannot be confirmed by a majority of the shareholders so as to bind the minority, one or more of the minority stockholders may undoubtedly maintain a bill to annul or redress the wrong or to prevent its accomplishment, notwithstanding the approval of it by the majority: *Brewer v. Boston Theatre*, 104 Mass. 378; *Peabody v. Flint*, 6 Allen, 52; *Heath v. Erie R. Co.*, 8 Blatchf. 347; *Marsh v. Eastern R. R. Co.*, 40 N. H. 548; *Cumberland Coal Co. v. Sherman*, 30 Barb. 553; *Dodge v. Woolsey*, 18 How. 331; *Coleman v. Eastern Counties R. Co.*, 10 Beav. 1; *Gregory v. Patchett*, 33 Id. 595; *Denier v. Hoopers' etc. Works*, L. R. 9 Ch. 350; *Mason v. Harris*, L. R. 11 Ch. Div. 97; *Davidson v. Tulloch*, 3 Macq. 783. But a stockholder who, with full knowledge, has himself acquiesced in an illegal, fraudulent, or unauthorized act of the directors, occasioning a loss of assets, cannot maintain a bill therefor: *Gregory v. Patchett*, 33 Beav. 595; *Scott v. Depeyster*, 1 Edw. Ch. 513.

There is no doubt that where a stockholder in a corporation suffers a direct and special injury, not common to other stockholders, from a wrongful or fraudulent act of the directors, or some of them, he may recover for such injury against the parties in fault. But this liability does not at all depend upon a special fiduciary relation between the parties. Thus, it is well settled that where, by false and fraudulent representations contained in prospectuses, reports, or circulars issued by the directors, respecting the condition and prospects of the corporation, one is induced to purchase shares therein, which eventually become worthless, he may maintain an action at law for damages against the directors, who, having knowledge of the falsity of the representations, or not knowing or believing them to be true, and intending to deceive, took part in or sanctioned the issuance of such prospectus, report, or circular: *Thompson's Liabilities of Officers and Agents of Corp.* 401; *Cross v. Sackett*, 16 How. Pr. 62; *Cazeaux v. Mall*, 25 Barb. 578; *Morgan v. Skiddy*, 62 N. Y. 319; *Nelson v. Luling*, 4 Jones & S. 544, affirmed 62 N. Y. 645; *Bedford v. Bagshaw*, 4 H. & N. 538; S. C., 29 L. J. Ex. 59; *Scott v. Dixon*, Id. 62, note; *Bale v. Cleland*, 4 F. & F. 117; *Clarke v. Dixon*, 6 Com. B., N. S., 453; *Gerhard v. Bates*, 2 El. & Bl. 476; *Davidson v. Tulloch*, 3 Macq. 783; *Peek v. Gurney*, L. R. 6 H. L. 377; S. C., *Thompson's Liabilities of Officers and Agents of Corp.* 309. Or such purchaser of shares may maintain a bill in equity against the guilty directors to compel them to make good his loss: *Peek v. Gurney*, *supra*. Or he may maintain a bill against the directors, joining the corporation as defendant, to be relieved of the shares which he has taken in the concern, and to recover the money paid thereon; *Ross v. Estates Investment Co.*, L. R. 3 Ch. 682; *Henderson v. Lacon*, L. R. 5 Eq. 249. Or where he purchased the shares of one of the directors, he may maintain a bill

against him alone to compel repayment, he offering to retransfer the shares: *Stainbank v. Fernley*, 9 Sim. 558.

In order to render directors personally liable in any form of proceeding for such misrepresentations, they must be willfully and fraudulently made, the directors sought to be charged knowing them to be false or not knowing them to be true, and intending to deceive: *Wakeman v. Dalley*, 51 N. Y. 27; S. C., 10 Am. Rep. 551; S. C., Thompson's Liabilities of Officers and Agents of Corp. 299; *Mabey v. Adams*, 3 Bosw. 346; *Nelson v. Luling*, 4 Jones & S. 544, affirmed 62 N. Y. 645; *Taylor v. Ashton*, 11 Mea. & W. 401; *Eaglesfield v. Londonderry*, L. R. 4 Ch. Div. 711. For false representations whereby the plaintiff was induced to take shares, but which were made *bona fide* under a reasonable and well-grounded belief in their truth, the directors are not liable: *Shrewsbury v. Blount*, 2 Man. & G. 475. No doubt also the representations must be in fact false at the time the plaintiff acts on them to give him a right to relief. If they are true then, though false when made, the defendants will not be liable as in case of a representation that a certain proportion of the capital was paid up: *Ship v. Crosskill*, L. R. 10 Eq. 73. It must appear also that there was some direct connection between the defendants and the plaintiff in the communication of the representations, and their influence on the latter's conduct: *Peek v. Gurney*, L. R. 6 H. L. 377; S. C., Thompson's Liabilities of Officers and Agents of Corp. 309, overruling *Bedford v. Bayshaw*, 4 H. & N. 538. But they need not be directly communicated by the defendants to the plaintiff; if they were made for general circulation to delude the public into taking shares, and the plaintiff, as one of the public, bought shares on the faith of them, it is enough: *Clarke v. Dickson*, 6 Com. B., N. S., 453; *Scott v. Dixon*, 29 L. J. Ex. 62, note; *Cross v. Sackett*, 16 How. Pr. 62; *Morgan v. Skiddy*, 62 N. Y. 319; Thompson's Liabilities of Officers and Agents of Corp. 405, 406. They must also have operated as an inducement to the purchase of the shares, but they need not have been the sole inducement: *Morgan v. Skiddy*, 62 N. Y. 319. To render a director liable for false representations in a circular or prospectus issued by his co-directors, whereby the plaintiff was induced to take shares, it must appear that such director expressly or tacitly authorized its issuance: *Cargill v. Bower*, L. R. 10 Ch. Div. 502, explaining *Peek v. Gurney*, L. R. 6 H. L. 377; S. C., Thompson's Liabilities of Officers and Agents of Corp. 309, where a director, who took no part in preparing or issuing a prospectus, and gave no authority therefor, and never saw it until it was issued and sent to him, was nevertheless held to have sanctioned it. Directors employing a manager to make false representations are liable therefor to the same extent as if made by themselves: *Western Bank v. Addie*, L. R. 1, H. L. 80. 145. They are not liable for false representations made in the articles of association prior to their election, whereby the plaintiff was led to buy shares: *Mabey v. Adams*, 3 Bosw. 346. A stockholder whose name has been struck off the register, on the ground of variance between the objects of the corporation stated in the articles and those stated in the prospectus, cannot maintain a bill against the directors to recover his deposit and calls where no fraud is alleged: *Stewart v. Austin*, L. R. 3 Eq. 299; *Ship v. Crosskill*, 10 Id. 73. In the former of these two cases it is said the remedy is at law, and in the latter it is said that liability is on the corporation.

A purchaser of spurious and worthless stock, fraudulently overissued by directors as genuine, may maintain an action for his damages against the directors, and so may a *bona fide* purchaser under him: *Cazeaux v. Mali*, 25 Barb. 578; *Shotwell v. Mali*, 38 Id. 445.

Where the directors of a corporation misapply a part of a fund to which a

stockholder has a distinct right, *e. g.*, a dividend, he may have an injunction: *Samuels v. Holladay*, 1 Woolw. 400; S. C., McCahon, 214. A director purchasing shares of a stockholder at their market value, knowing them to be worth more owing to information obtained by him as director, cannot, in the absence of fraud, be held liable to such stockholder: *Board of Commissioners v. Reynolds*, 44 Ind. 509; S. C., 15 Am. Rep. 245.

Under a Vermont statute, it was held that an individual stockholder in a bank could sue the directors for making a loan to one person in excess of the amount allowed by the banking laws whereby a loss happened: *Buell v. Warner*, 33 Vt. 570. Under an act providing that "every director" who shall violate certain statutes "shall be liable," etc., a single stockholder may sue a single director for taking part in the allowance of a dividend out of the capital contrary to law, but the declaration must show that a majority of the directors participated in the act: *Gaffney v. Colwell*, 6 Hill, 567.

4. *Right of Creditors and Others to Sue.*—Where by false representations fraudulently made and published by directors of a corporation, or with their sanction, respecting the financial condition of the corporation, a creditor is induced to lend money to the corporation, or to make a deposit, or to purchase its debentures, he may undoubtedly have an action against those directors for damages where the loan or deposit is lost or the securities become worthless: *Zinn v. Mendel*, 9 W. Va. 580; *Schley v. Dixon*, 24 Ga. 273; *Weir v. Barnett*, L. R. 3 Exch. Div. 32. So, where one is induced to insure in an insurance company by false and fraudulent representations permitted by the directors to be published as to the company's condition, where after a loss the insurance money cannot be recovered owing to the insolvency of the corporation: *Salmon v. Richardson*, 30 Conn. 360. But as in other cases, such false representations are not actionable unless made fraudulently with intent to deceive, nor unless they are actually relied on: *Zinn v. Mendel*, *supra*; *Arthur v. Griswold*, 55 N. Y. 400. Nor are they liable for false representations by the active managers of the company, or by brokers employed by them by authority of the corporation to negotiate its debentures where they have no personal knowledge of the fraud, the brokers or managers not being deemed their agents, but the agents of the corporation: *Arthur v. Griswold*, *supra*; *Weir v. Barnett*, *supra*. Where directors of a company procure a loan upon a representation that they have authority to borrow money when they had not, or when their borrowing powers are exhausted, it is held that they are personally liable therefor on a failure to collect from the corporation, on the ground of a breach of warranty of authority: *Richardson v. Williamson*, L. R. 6 Q. B. 276; *Weeks v. Propert*, L. R. 8 C. P. 427. But where by mistake of law the directors of a corporation procured a loan of money on a certain kind of bond which turned out to be invalid, they were held not personally liable: *Rashdall v. Ford*, L. R. 2 Eq. 750; S. C., 35 L. J. Ch. 769; S. C., 14 L. T., N. S., 790.

The personal liability of directors on contracts entered into on behalf of the corporation is governed by the ordinary law of principal and agent: *Ferguson v. Wilson*, L. R. 2 Ch. 77, *per* Lord Cairns. If they fail so to contract as to bind the principal, they bind themselves. If before the corporation is fully organized they enter into a contract as directors, they are personally bound: *Hurst v. Salisbury*, 55 Mo. 310; *Herod v. Rodman*, 16 Ind. 241. So, especially, where the corporation finally fails of complete organization: *Double-day v. Musbett*, 7 Bing. 110; S. C., Thompson's Liabilities of Officers and Agents of Corp. 291. So where, after the corporation is fully organized, they sign a note or other contract with their individual names, and affix their in-

dividual seals, so that the corporation is not bound, they are personally bound: *McClure v. Bennett*, 12 Am. Dec. 223; *McCullin v. Gilpin*, L. R. 5 Q. B. Div. 390; S. C., 6 Id. 516. In *Abeles v. Cochran*, 22 Kan. 405; S. C., 31 Am. Rep. 194, it is held that where directors of a corporation make a contract for the purchase of stock in the name of the corporation, which is *ultra vires*, they are not personally liable thereon. Directors do not become personally liable on checks drawn on the company's bankers, signed and countersigned in a particular manner, merely because they have instructed the bankers to honor checks so drawn: *Beattie v. Ebury*, L. R. 7 H. L. 102.

The capital stock and assets of a corporation being in equity regarded as a trust fund for the payment of debts, particularly in American courts: See note to *Freeland v. McCullough*, 43 Am. Dec. 685; and the directors being, in a certain sense at least, trustees thereof for the creditors, they may undoubtedly be held liable in equity, at the suit of an injured stockholder, for breaches of trust whereby the fund is misapplied or wasted, leaving the debts unpaid: *Bank of St. Mary's v. St. John*, 25 Ala. 566; *Schley v. Dixon*, 24 Ga. 273; *Cunningham v. Pell*, 5 Paige, 607; *Moses v. Ocoee Bank*, 1 Lea, 398; *Shea v. Mabry*, Id. 319; *Union National Bank v. Douglass*, 1 McCrary, 86. So directors of a saving fund may be held liable in equity to defrauded depositors, where, by gross negligence, fraud, and mismanagement, the fund is wasted: *Maisch v. Saving Fund*, 5 Phila. 30; *Leffman v. Flanagan*, Id. 155. As examples of breaches of trust for which directors of a corporation may thus be held liable at the suit of creditors, may be mentioned the appropriation of part of the assets to the directors: *Union National Bank v. Douglass*, 1 McCrary, 86; *Cunningham v. Pell*, 5 Paige, 607; repaying to shareholders the whole or part of the capital: *In re National Funds Ass. Co.*, L. R. 10 Ch. Div. 118; allowing them to withdraw funds to the extent of their subscriptions, for use in private business: *Bank of St. Mary's v. St. John*, 25 Ala. 566; receiving unauthorized securities in payment of stock: *Moses v. Ocoee Bank*, 1 Lea, 398; applying assets to the payment of corporate debts for which the directors are sureties, to the injury of other creditors, where the corporation is insolvent: *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263. Since the trust fund is for the benefit of all the creditors, the suit should be brought by the plaintiff for himself and all other creditors: *Schley v. Dixon*, 24 Ga. 273. All the directors need not be joined as defendants, but the corporation is a necessary party: *Cunningham v. Pell*, 5 Paige, 607.

A corporation creditor cannot sue the directors at law for non-feasance of a duty to the corporation: *Fuss v. Spaulhorst*, 67 Mo. 256; *Zinn v. Mendel*, 9 W. Va. 580; nor even for fraud in the management and disposition of corporate property: *Zinn v. Mendel*, *supra*; *Smith v. Poor*, 40 Me. 415. So it is held in *Branch v. Roberts*, 50 Barb. 435, that the holder of bills of a banking corporation cannot sue the directors for damages for misconduct rendering the bills valueless. Mr. Thompson, however, declares this case not to be "good law:" Thompson's Liabilities of Officers and Agents of Corp. 400. It seems to us that so far as the case holds that the creditor has no remedy at law, it is in accord with other cases on the subject. Directors of a corporation cannot be held liable to creditors for declaring a dividend where there are no profits to be divided, if they act in good faith, believing such a fund to exist: *Lexington etc. R. R. Co. v. Bridges*, 46 Am. Dec. 528. Where the directors of an insurance company decide to close business while a creditor's claim is being litigated, and in good faith set apart a sum which they suppose sufficient to pay it and the expenses of closing, dividing the residue among the policy holders, but the expenses unexpectedly absorb the fund set apart, the creditor cannot, after

judgment in his favor, maintain a bill against the directors: *Lyman v. Bonney*, 118 Mass. 222.

STATUTORY LIABILITY FOR CORPORATE DEBTS ON GROUND OF NEGLIGENCE OF DUTY.—There are statutes in most of the states making the directors of a corporation liable for its debts where they are guilty of certain official delinquencies, such as failing to make the reports required by law, making false reports, allowing the debts to exceed a certain proportion of the capital, or of the capital paid in, etc. An intelligent discussion of this branch of the subject would require a synopsis of the various statutes to be given, which would be impossible in the space allotted to this note. It is a general principle, applicable to all such statutes, that they are penal in their nature, and therefore to be strictly construed, and a clear case must be made out to enforce the liability: *Thompson's Liabilities of Officers and Agents of Corp.* 432; *Union Iron Co. v. Pierce*, 4 Biss. 327; *Irwine v. McKeon*, 23 Cal. 472; *Gregory v. German Bank*, 3 Col. 332; *Bird v. Hayden*, 2 Abb. Pr., N. S., 61; *Vincent v. Sands*, 11 Id. 370; S. C., 42 How. Pr. 235; *Craw v. Easterly*, 4 Lana. 513; *Victory Webb Printing Co. v. Beecher*, 26 Hun, 48; *Anderson v. Spears*, 58 How. Pr. 68; *Vernon v. Palmer*, 62 Id. 425; *Rorke v. Thomas*, 56 N. Y. 559; *Bruce v. Platt*, 80 Id. 381. As a consequence of the penal nature of such statutes, actions to enforce the liability arising thereunder cannot be brought in another state: *Halsey v. McLean*, 12 Allen, 438; *First Nat. Bank v. Price*, 33 Md. 487; *Derrickson v. Smith*, 27 N. J. L. 166; *Bird v. Hayden*, 2 Abb. Pr., N. S., 61; *Price v. Wilson*, 67 Barb. 9; *contra: Cady v. Sanford*, 53 Vt. 632.

Another result of the penal character of such statutes is that there is no vested right in a cause of action arising thereunder until it has been reduced to judgment, and a repeal of the statute without a saving clause destroys all existing rights of action: *Union Iron Co. v. Pierce*, 4 Biss. 327; *Gregory v. German Bank*, 3 Col. 332; *Breitung v. Lindauer*, 37 Mich. 217; S. C., *Thompson's Liabilities of Officers and Agents of Corp.* 416; *Victory Webb Printing Co. v. Beecher*, 62 Hun, 48; *Knox v. Baldwin*, 80 N. Y. 610.

THE PRINCIPAL CASE CAME AGAIN BEFORE THE COURT on a petition for a rehearing in 3 R. L. 9, when Greene, C. J., again delivered the opinion, reaffirming his former decision, and the petition for a rehearing was dismissed. The case is frequently cited in subsequent decisions on the same subject in the United States. It is cited in *Baker v. Backus' Adm'r*, 32 Ill. 105; *Ohio Ins. Co. v. Nunnemacher*, 15 Ind. 296; *Rogers v. Lafayette Agricultural Works*, 52 Id. 296; *Treadwell v. Salisbury etc. Co.*, 7 Gray, 400; *Dodge v. Woolsey*, 18 How. 343, as an authority upon the subject of the jurisdiction of a court of equity over corporations and over suits against them by shareholders. In the case last cited, Wayne, J., speaks of it as "the best argued and judicially considered case which we know upon the point, both upon the original hearing and upon the rehearing." The case is cited also as an authority for the doctrine that a corporation may sell its property to a new corporation and take stock therein in payment, in *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 593; *Treadwell v. Salisbury etc. Co.*, 7 Gray, 406; *Hove v. Boston Carpet Co.*, 16 Id. 495.

SMITH v. SMITH.

[1 RHODE ISLAND, 303.]

ALTERATION OF FIGURES ON MARGIN OF BILL of exchange, indicating the amount, so as to conform it to the body of the bill, without the drawer's knowledge, does not avoid it, the figures constituting no part of the bill. **PAROL EVIDENCE THAT BILL WAS DRAWN FOR SUM EXPRESSED IN MARGINAL FIGURES**, and not for the sum expressed in the body of it, where they differ, is inadmissible.

ASSUMPSIT against the acceptor of a bill of exchange. In the body of the bill, as originally drawn, the amount was stated in words to be three hundred and seventy-five dollars and ninety-four cents, but the figures in the margin were "\$175.94." At the trial it appeared that the figures in the margin were changed by the clerk of the bank discounting the bill so as to agree with the body of it, and the defendant therefore objected to its admission in evidence, as avoided by the alteration.

Potter, for the defendant.

Currey, contra.

By COURT. We do not think the marginal notation constitutes any part of the bill. It is simply a memorandum or abridgment of the contents of the bill for the convenience of reference. The contract is perfect without it. If this is so, any alteration in the figures cannot avoid the contract, because it is no alteration, either material or immaterial, in the contract.

The bill having been allowed to pass to the jury, the defendant offered testimony to show that the bill was drawn, negotiated, and accepted, for only one hundred and seventy-five dollars and ninety-four cents; but the court held the evidence clearly inadmissible, and overruled it.

FIGURES ON MARGIN OF NOTE OR BILL: See *Nugent v. Roland*, 13 Am. Dec. 381, and note. Marginal figures on a check constitute no part of it, but are merely for convenience of reference; they may be there or not; they may differ with the body of the check or not; it is the same thing. The instrument is perfect without them: *National Bank of Rockville v. Second National Bank*, 69 Ind. 485, citing the principal case.

ALTERATION OF INSTRUMENTS: See *Wilson v. Henderson*, 48 Am. Dec. 716; *Lee v. Alexander*, Id. 412; *Simpson v. Stackhouse*, 49 Id. 554; *Beaman v. Russell*, Id. 775, and prior cases in this series cited in the notes thereto.

CASES IN EQUITY
IN THE
COURT OF APPEALS
OF
SOUTH CAROLINA.

THOMSON v. PORTER.

[4 STROBART'S EQUITY, 53.]

MERCHANT'S BOOKS, TO BE EVIDENCE OF SALE AND DELIVERY, must contain the original entries, which must be such as are usually made in the course of business.

MERCHANT IS COMPETENT TO PROVE HIS OWN ENTRIES and the delivery of the goods.

MERCHANT'S BOOKS, WHERE PASS-BOOK IS KEPT, or where goods are delivered on another's order, are not admissible in evidence, unless the absence of the pass-book or order is explained.

WHERE MERCHANT'S ENTRIES ARE MADE UPON CLERK'S STATEMENT, the latter only can prove delivery of the goods.

MERCHANT PLAINTIFF PROVING ENTRIES MAY BE CROSS-EXAMINED as to the circumstances under which the entries were made.

BOOK ENTRIES BY DECEASED COPARTNER may be proved to have been made by him in the usual course of business, and this raises a presumption of sale and delivery, and will prevail *pro tanto* unless rebutted.

MARY PORTER died, and Thomas Talbird, sen., became her administrator. D. L. Thomson was Mrs. Porter's son-in-law, and also a merchant in business with James Thomson. Mrs. Porter contracted (it is alleged) with this firm, the plaintiffs, sundry accounts. Talbird put intestate's children to board with D. L. Thomson, which brought him in his debt. Talbird, sen., died, and Joseph J. Porter became administrator *de bonis non* of Mary Porter, and Talbird, jun., became administrator of Talbird, sen. Thomson commenced a suit at law against the representative of Talbird, sen., on the contract for board, when Porter applied to the commissioner for an injunction to prevent Talbird's representative from paying the amount, alleging that Thomson still held in his hands considerable

of Mary Porter's money, and asking that the money be paid to him, Porter, instead. The injunction was granted. The commissioner reported that one thousand two hundred and sixty dollars and sixty-five cents was proved by the books to be owing to plaintiff from Mary Porter, but that certain credits were to be deducted, leaving a balance of six hundred and eighty-two dollars and seventy-three cents. Both parties excepted. To reach this result, the commissioner permitted plaintiff to give in evidence his book of original entries showing bills of goods charged to Mrs. Porter to the amount stated. On cross-examination, Thomson testified that a considerable portion of the goods were delivered to members of Mrs. Porter's family or servants, who carried a pass-book, and that such goods were charged to her by her direction. Neither the pass-book, nor any order of Mrs. Porter, was offered in evidence. Some of the entries were made by James Thomson, since dead.

E. and H. Rhett, for the defendant.

De Treville, contra.

By Court, CALDWELL, Chancellor. The first, second, and third grounds of appeal relate to the competency and sufficiency of the evidence to establish the account of D. L. & J. Thomson, for goods sold and delivered to Mary Porter, of whom the defendant is the administrator *de bonis non*.

The act of 1721 recognizes that it had been before allowed for law in the province, "that books of account shall be allowed for evidence, the plaintiff swearing to the same, by reason that the merchants and shop-keepers in South Carolina have not the same opportunity of getting apprentices and servants to deliver out their goods and keep their books of account, as merchants and shop-keepers have in South Britain," etc.

The necessity and convenience of such a rule, and its early adoption in the practice of the courts of this country, in addition to its distinct recognition, are, perhaps, sufficient to raise the presumption that there had been a previous act authorizing the admissibility of such evidence, and modifying in some material parts the statute of 7 Jac. I., c. 12. It is now immaterial from what source the rule originated, as it is permanently established and its construction well settled. When the merchant or shop-keeper relies upon his books as evidence of his sale and delivery of goods, he must produce his original entries, which must be such as are usually made in the course of business and trade, and he is competent to prove his own entries and the delivery of the goods; the rule was adopted

for that class of cases, but does not apply to the case where the goods are taken up on an order, or where they are entered in a pass-book, and in either case delivered to a third person and not to the purchaser; there, the plaintiff must furnish other proof of the sale and delivery of the goods than his original entries, which cannot supply the production of the order or the pass-book, which would be the best evidence to establish the contract. If these be lost or destroyed, then the common-law rule of proving their existence, contents, and loss must, if required, be enforced. So in the case of a merchant or shop-keeper making the entries himself from the statement of his clerk, the latter must prove the delivery of the goods, and the former is incompetent to establish it.

When the law grants this extraordinary privilege to the plaintiff to prove his account where he makes the sale, entry, and delivery of the goods, it has, with great propriety, not prohibited or restricted the defendant from ascertaining by a cross-examination the circumstances under which the entries are made. This is frequently the only shield against a false or fraudulent account. When it appears on the plaintiff's cross-examination that he did not deliver the goods to the defendant, or delivered them to a third person, although he made the original entries, the books of account must be excluded, as they are neither within the letter nor the spirit of the act—they are not the best evidence of which the case admits, and the withholding of the other higher and better proof raises a presumption against the justice of the claim.

The case of *Clough v. Little*, 3 Rich. L. 353, is an illustration of these views. The plaintiff brought suit for cotton bagging sold and delivered to defendant, and produced his books of original entries, and testified to them as made by himself; he was then asked by defendant's counsel if he had sold and delivered the bagging himself personally to the defendant. The question was objected to, on the ground that the plaintiff's examination should be confined to the proof of the entry. Justice Gantt held that the question was admissible, and the plaintiff answered that his clerk reported to him the terms agreed upon between him and Little respecting the sale of the cotton bagging, and upon that report, the plaintiff made the entry and delivered the bagging to a drayman, who told him the defendant had sent for it. A nonsuit was ordered, and the court of appeals, in refusing the motion to set it aside, say, that as book entries made by merchants and shop-keepers in the regular course of their business, are admitted in evidence

from convenience and necessity, the best security which the rule furnishes is, that they must be supported by their oaths, and that were useless, unless the defendant could cross-examine them, for that is the only means of purging their consciences. By this rule, the merchant is allowed to be a witness for himself, and there is no case in which, according to the rules of the common law, an *ex parte* examination where the witness is present, and in the power of the court, has been admitted or allowed as evidence.

The plaintiff, in the case under consideration, on his cross-examination, failed to prove a delivery of the goods to the intestate, and his testimony, as neither her orders nor pass-book were produced, or any proof made in relation to them, was as insufficient as it was incompetent to establish his account. But the entries made in the books by his deceased partner stand upon a different footing; the proof of their being in the handwriting of one who is dead, and of their being made in the regular and usual course of business, is sufficient to raise the presumption that the goods were sold and delivered to the intestate, and must prevail *pro tanto*, unless it be rebutted by proof on the part of the defendant. As the evidence was insufficient to sustain the verdict as to that part of the plaintiff's claim for the goods he entered in the books of account, the circuit chancellor was right in referring that part of the case to the commissioner.

The question of set-off was not finally adjudged by the chancellor on the circuit. As the continuance of the injunction cannot have that effect while the accounts of the parties are under reference, it would, therefore, be premature to entertain that question here, as it can only be brought up in the regular way, by exceptions to the report of the commissioner, which must first be heard on the circuit before they can come here.

It is therefore ordered and decreed that the appeal be dismissed, and that the circuit decree be affirmed.

DUNCAN and DARGAN, chancellors, concurred

JOHNSTON, chancellor, absent at the hearing.

Appeal dismissed.

BOOK OF ORIGINAL ENTRIES kept in form of a ledger is admissible in evidence: *Odeh v. Culbert*, 42 Am. Dec. 317. So the book of a mechanic is competent evidence of work done or material furnished at his shop in the way of his trade: *White v. St. Philip's Church*, 39 Id. 125. The books need not be kept in any particular form to entitle them to admission in support of the ac-

counts, but they must show of themselves the charges, and the entries should be made at or near the time of the transaction of which they are the record: *Cummings v. Nichols*, 38 Id. 501; *Mathes v. Robinson*, 41 Id. 505. And though the entries were first made on a slate by a foreman, and afterwards transcribed by a manufacturer to his books, yet they are admissible: *Sickels v. Mather*, 32 Id. 521. But even original entries are not admissible, unless the person who made them is produced or is shown to be dead: *Merrill v. Ithaca & Oswego R. R. Co.*, 30 Id. 130, and note 142, where other cases are collected; and see *Union Bank v. Knapp*, 15 Id. 181, and note, where the subject is discussed at length.

ENTRIES BY CLERK AND CARTER WHO DELIVERS GOODS from his memoranda immediately upon his return from making such delivery are original entries: *Churchman v. Smith*, 36 Am. Dec. 211.

ENTRIES BY PERSON DECEASED may be proved to have been made by him and then admitted in evidence: *Odell v. Culbert*, 42 Am. Dec. 317, and note.

GLENN v. WALLACE.

[4 STROBART'S EQUITY, 149.]

SURETIES OF ADMINISTRATOR ARE ALL LIABLE TO DISTRIBUTORS of an estate, whatever their rights may be *inter se*.

SURETIES ON SUBSTITUTED ADMINISTRATION BOND are primarily liable IN COURT OF EQUITY, PARTY TO SUIT MAY BE COMPETENT WITNESS.

PLAINTIFF CANNOT EXAMINE CO-PLAINTIFF as a witness.

DEFENDANT CANNOT EXAMINE PLAINTIFF AS WITNESS, but must file his bill of discovery.

IF EXAMINATION OF PARTIES AS WITNESSES IS INTENDED, a statement in writing of the points upon which it is proposed to examine them should be submitted, that the court may perceive whether the witness is interested or not.

ROGERS, Glenn (complainant), and Van Lew were sureties on the bond of Huson, administrator of William Brummett. Glenn became dissatisfied, and asked to be released. Huson then gave a new bond, with Lewis and Rogers as sureties, and released Glenn from liability so far as might be "consistent with the interest of the parties concerned, and not contrary to law." Suit was afterwards commenced on the bond, and the court found the sureties on the substituted bond primarily liable. The opinion states the other facts necessary to an understanding of the case.

Herndon, for the defendants.

Dawkins, for the plaintiff.

By Court, DUNKIN, Chancellor. It may be now considered as well settled that, in cases of this character, whatever may be the rights of the classes of sureties *inter se*, they are all liable

to the distributees of the estate. And this affords a very satisfactory answer to the argument that the complainant, Glenn, is concluded by the judgment at law. The suit was preferred at the instance of the distributees. The administration of his principal, Huson, had never been revoked. The ordinary had no authority to discharge his liability, and his decree cautiously avoids any such inference.

But, as between the sureties themselves, there is nothing to prevent the court, as was said in *Field v. Pelot*, McMull. Eq. 887, when the surety applies for relief, "to require a new security, which, as between the sureties themselves, shall be the primary one, leaving the former only collateral; and this," adds the court, "seems to be the nature of the new surety's undertaking."

It was proposed, however, to prove by Levi Rogers, one of the defendants, and who was a surety on both bonds, that there was a different understanding or agreement among the parties as to their respective liabilities. This witness was rejected by the court as incompetent, and the ruling on this point constitutes the first ground of appeal. Although, at law, no party to the record is competent to testify, the rule in this court has always been different; and for obvious reasons. "A suit in equity often contains many issues, and the general rule compels all who are interested in any way to be made parties, either plaintiffs or defendants; it often happens that a person who could furnish material evidence respecting one point in dispute is precluded from doing so by being made a party in consequence of some interest in another point."

To obviate this inconvenience, leave is frequently given, according to the English practice, for a party to be examined on motion, or on a petition filed, suggesting that he is not interested. "The interest spoken of in the motion is interest in the matter to be examined into, not interest generally in the cause." The order is accordingly made, saving all just exceptions, which means reserving all objections except the single one that he is a party to the cause. In this way, a plaintiff may examine a defendant who is not interested, or on a matter in which he has no interest; and a defendant may examine a co-defendant in like manner. But a plaintiff cannot examine a co-plaintiff as a witness. If he would have his testimony, he must cause his name to be struck out as a plaintiff, and make him a defendant. Nor can a defendant be allowed to examine the plaintiff, but must file a bill of discovery. Such is the well-established doctrine and practice of Westminster

Hall, and our own does not differ from it, except that it has not been usual to obtain any special order, or to file a petition for leave to examine a party to the record as a witness. But it is always proper that a statement in writing should be submitted as to the points to which it is proposed to examine the party, in order that the court may distinctly perceive whether he is or is not interested.

In this case, the court have no difficulty. It was explicitly announced that the purpose was to prove that the parties to the second bond were not to be primarily liable, or were only to be liable in proportion with the parties to the first bond. Rogers was surety on both bonds. But in the first bond there were two sureties besides himself. In the second bond, Lewis alone was his co-surety. The interest of Rogers was to have as many as he could to share the burden with him—in other words, to make the first bondsman liable where there were three sureties, or to make the bonds cumulative when there would be four sureties to divide the loss. It is impossible, therefore, to say that he had no interest in the matter touching which it was proposed to examine him. His interest was to multiply the number of sureties, to throw the burden on both bonds rather than on either, and on the first bond rather than the second. It is no answer to say that Van Lew, one of the sureties on the first bond, was not in a pecuniary condition to aid in the discharge of the obligation. Who can affirm that he would never be in a condition to contribute his proportion? The court is of opinion that the witness was properly rejected.

The other grounds of appeal have been already sufficiently discussed. It is ordered that the decree be affirmed, and the appeal dismissed.

JOHNSTON and DARGAN, chancellors, concurred.

Appeal dismissed.

PARTY TO RECORD MAY BE WITNESS when he has no interest and the suit is in chancery and he is defendant: *Comstock v. Hadlyme Ec. Soc.*, 20 Am. Dec. 100; or when he is only a nominal party and has no interest: *Ford v. Sproule*, 12 Id. 439; or where his testimony is given voluntarily against his interest: *Cowles v. Whitman*, 25 Id. 60; or where the other party calls him, and he does not claim his exemption: *Prewett v. Marsh*, 21 Id. 645; or to prove diligent search for a lost document, for the purpose of authorizing the introduction of secondary evidence: *Apperson v. Cottrell*, 29 Id. 239; *Juman v. Toulmin*, 44 Id. 448; *Oriental Bank v. Haskins*, 37 Id. 140, and note; *Harvey v. Thomas*, 36 Id. 141; or to prove the loss of a note, unless he has designedly destroyed it: *Blade v. Noland*, 27 Id. 126.

PARTY TO RECORD CANNOT BE MADE WITNESS against his consent: *Tenny v. Evans*, 40 Am. Dec. 194.

THROWER v. CURETON.

[4 STROBHEART'S EQUITY, 155.]

STATUTE OF LIMITATIONS IN CASE OF FRAUD.—Where complainant claimed that at a sheriff's sale defendant stifled competition by declarations to bidders, but that he (complainant) did not learn of it for six years, though he was at the sale: *Held*, that his ignorance was his own fault, and the defendant might avail himself of the statute.

IT SEEMS THAT ALLEGATION OF IGNORANCE OF FRAUD until within four years, on the part of plaintiff, throws the burden of proof of his knowledge before that time on the defendant.

COMPLAINANT'S property was sold at sheriff's sale in 1842. It was alleged to be worth three thousand dollars. It sold for eleven dollars and twelve and one half cents. One Massey was present at the sale and desired to bid. Defendant told him he was bidding to save himself, and the land must bring its value. Others might have heard the conversation. Massey intended to bid two hundred dollars for one piece of the land. The suit was not commenced till 1848. Defendant pleaded the statute of limitations. The bill was dismissed, and plaintiff moved to reverse the decree of the chancellor.

Clinton and Hanna, for the motion.

Witherspoon, contra.

By Court, DUNKIN, Chancellor. The chancellor, having determined that the defendant's plea in bar should be sustained, has not detailed the whole of the testimony, but expressly waives a further examination of it, or the consequences resulting from it. But judging from the facts reported, this court is of opinion that they afford no ground for invalidating the purchases made by the defendant.

We are all of opinion that the plea was properly sustained. The ground of complaint is, that at a sheriff's sale the defendant fraudulently stifled competition, by certain public declarations which he then and there made to the by-standers. Whatever he said or did might have been heard or observed by any man in the crowd, and so the evidence establishes. If it can be believed that this was not known to the complainant until six years afterwards, it is his own fault. But this should not take from the defendant the shield which the statute affords to any discussion of long by-gone transactions.

The decree is affirmed and the appeal dismissed.

DARGAN, chancellor, concurred.

JOHNSTON, Chancellor. I deem it worth while in this case to express my opinion separately; although I come to the same result with the chancellor, and therefore concur in affirming his decree. I do not think the facts stated in the decree are any evidence of fraud on the part of the defendant; and therefore am of opinion the bill was properly dismissed, independently of the statute of limitations.

On the subject of the statute, if the case were necessarily to be put on that, I should have more difficulty. The bill avers that the facts constituting the alleged fraud came to the plaintiff's knowledge within four years before the filing of the bill. Such an allegation is substantially an averment that the plaintiff was ignorant of them until that time; and I am of opinion that such an averment throws the burden upon the defendant of proving that the plaintiff was acquainted with the facts for four years or upwards before the bill was filed; otherwise, he is not entitled to the benefit of his plea of the statute.

I avail myself of this occasion to throw out this opinion, with some of the reasons upon which it is founded, because I believe there is some misapprehension among some portion of the profession upon the subject.

The general doctrine is that the statute will not be applied in equity as a bar to relief against fraud until the facts constituting the fraud are discovered. Cases upon this subject present the question whether the plaintiff, in averring his ignorance of the fraud of which he complains, is to be regarded as offering a reason why the statute should not run against him, or whether his negative averment is not rather to be regarded as the statement of a case which is *prima facie* true; and thereby furnishing the defendant a fair opportunity to deny the fact, and entitle him to the benefit of the statute, by proving notice or knowledge on the part of the plaintiff.

If the plaintiff is obliged to prove his ignorance prior to the time when he admits in his bill that he received information, this is a negative which, in its nature, does not admit of proof; and it follows that the bar of the statute must be applied by this court from the date of the fraudulent transaction—contrary to its own maxim, that the statute, in cases of fraud, runs only from the discovery. "Ignorance," says Johnson, J., in the case of *Hopkins v. Mazyck*, 1 Hill Ch. 251, "cannot be proved. Who can enter into the heart of man and ascertain what knowledge dwells there?"

It comes to this, then: that if the burden of proof lies on the

plaintiff—if he can relieve himself from the currency of the statute only by proving his ignorance—the protection afforded him by the maxim of this court is a mockery; and the court might as well permit the statute to run from the perpetration of the fraud.

It is a general rule that negatives need not be proved; and the cases in which exceptions are allowed will be found to be cases in which the nature of the matters involved admits the possibility of proof. But ignorance, in its very nature, admits of no evidence.

The analogy is strictly to cases where a party pleads or avers a want of notice; of which *Eyre v. Dolphin*, 2 Ball & B. 303, may serve as an example. The answer stated a purchase for valuable consideration, without notice, and upon going into evidence, the plaintiff had to prove the notice.

Undoubtedly, it is the English practice that if plaintiff charges fraud, and that it was not discovered till within the statutory period, the statute is not a good plea, unless the defendant denies the fraud, or avers that the fraud, if any, was discovered beyond the time limited by the statute. Now, if the defendant contents himself with denying the fraud, and it is found against him, the plaintiff must be relieved. If, however, the defendant would avail himself of the statute, he must aver that the fraud was discovered more than six years (with us four years) before bill filed.

1. He must swear to the discovery.

2. As he avers an affirmative proposition, I think he must prove it.

The English practice requires him to plead it, averring the discovery in the plea, and supporting the plea by answer. The averment must be made and proved in order to bring defendant's case within the statute; so I infer.

It is true that in *Booth v. Warrington*, 4 Bro. P. C. 163, and *Wamburzee v. Kennedy*, 4 Desau. 479, some proof was attempted of the time of discovery; but as might be expected, it amounted to nothing, as such proof always will; and in the latter case the chancellor says: "They state in the bill that they were not informed until within one year of filing their bill; and there is no proof, on the other side, to induce a belief that they had any earlier knowledge."

Says Chancellor Harper, in *White v. Poussin*, Bail. Eq. 459: "The rule is notorious that time will not run to protect a fraud until the fraud has been discovered" (which, by the way,

is very much the way in which the doctrine is laid down in *South Sea Co. v. Wymondsell*, 3 P. Wms. 144). "It is true," continues Chancellor Harper, "that the party seeking relief in such a case must allege that the fraud was discovered within the statutory period before the filing of the bill. The allegation is not strictly susceptible of proof; but it is material to put the defendant upon proof of discovery." To the same effect, see his observations in *Thayer v. Davidson*, Bail. Eq. 420.

These observations I have thought proper to make, with a view to future cases, as well as because unless I was satisfied here that there was proof of knowledge in the plaintiff prior to the time stated in his bill, I could not concur in the application of the statute.

But it appears that the plaintiff was at the sale, and had opportunities to know all the facts upon which he now relies. I therefore think the bill was well dismissed on the ground of the statute as well as on the merits.

Decree affirmed.

STATUTE OF LIMITATIONS BEGINS TO RUN from discovery of the cause of action, where knowledge was prevented by fraud: *Haynie v. Hall's Ex'r*, 42 Am. Dec. 427; but ignorance of the cause of action does not of itself prevent its running: *Smith v. Bishop*, 31 Id. 607. And at law, even fraudulent concealment will not stop the statute running, though the plaintiff was thereby prevented from knowing that his cause of action had accrued; but equity will relieve in such a case: *Fee v. Fee*, 36 Id. 103; *Smith v. Bishop*, 31 Id. 607; and note to *Reeves v. Dougherty*, 27 Id. 503, where other cases in this series on this subject are collected.

HOPKINS v. HOPKINS.

[4 STROBHART'S EQUITY, 207.]

STATUTE OF LIMITATIONS, IN CASE OF MISFEASANCE OR NON-FEASANCE OF AGENT, begins to run at the termination of the agency, if it is general or continuing; but if it is special, and the agent receives special authority for each act, then the statute begins to run from each of the several transactions.

ASSIGNEE OF UNASSIGNABLE LEGAL CHOSSES MAY BRING SUIT in equity in his own name for the enforcement of his own claims, but he must make the assignor a party, and the transaction must be *bona fide*.

IN SUIT BY ASSIGNEE OF UNASSIGNABLE LEGAL CHOSSES, the assignor is not a competent witness for him.

AFTER SUBMISSION OF HIS CASE ON FINAL HEARING a party has no right to the privilege of being allowed to amend.

THE opinion states the facts.

Herndon, for the complainants.

Gregg, McAlilly, and Dawkins, for the defendant.

By Court, DARGAN, Chancellor. In the argument of this appeal, many questions have been presented, and earnestly urged upon the attention of the court. From the disposition which the court has thought proper to make of the case, it will not be necessary for me to notice and discuss in this opinion all the questions that have been made.

The complainants are the sons of Mrs. Sarah Hopkins. The defendant's intestate, and late husband, John A. Hopkins, was also her son, and lived with her, while the complainants lived in the west. The bill charges that John A. Hopkins was the agent of his mother, Mrs. Sarah Hopkins, and sold her cotton and some other property, and that, by virtue of this agency, he sold her cotton and received the proceeds of the same, from the year 1834 to the year 1845, inclusive, with the exception of the year 1841; for which he has never accounted, and is still indebted to a large amount. It is also stated in the bill, and is proved, that Mrs. Hopkins has executed an assignment to the complainants, of her account against the estate of the intestate; the items of which consist of the proceeds of the sales of the cotton, charged to have been received by him in the years before mentioned, of some money lent, and the proceeds of the sale of some mules. The assignment purports to have been executed for valuable consideration, but it is admitted that the consideration was love and affection. The answer of the defendant denies all knowledge of the transactions stated in the bill, which she alleges relate to a period of time before her intermarriage with the intestate, while she lived in another district, and was a stranger to the relations that subsisted between the different members of this family. These are the simple facts of the case, upon which I am to announce the judgment of this court.

The first point to which I will direct my attention will be the plea of the statute of limitations, which the presiding chancellor held to have barred the claim, with the exception of such portion of it as arose within four years before the filing of the bill. There is not the slightest difference of opinion between the members of this court as to the principles of law which bear upon this question. If there was a general or continuing agency, the statute would not commence to run until the termination of the agency. Assuming that there was a general and continuing agency, the statute would not

bar the account; as the agency (if such a one existed) continued to the day of the intestate's death, and the bill was filed within one year afterwards. If the agency was special, and related to isolated transactions, in regard to which the intestate received special authority from his mother to act for her in those particular matters, then the statute would commence to run from each of those several transactions; and each of which would be barred or not, according to the time that had elapsed from their respective dates to the filing of the bill.

From the fragments of the evidence that have been printed in the brief, it would seem that there was a general agency. But the chancellor who tried the cause is of the opinion that if all the evidence had been presented, the conclusion to be deduced from the whole would be that the agency was special. The brief in this case was very imperfectly prepared. And this has been the case with a great many of the briefs furnished during this term, which has occasioned much difficulty and embarrassment to the court. I will take the occasion to say that this affords just cause of complaint; and further to remark, that if error and misconception arise from this cause, there cannot be a doubt as to where the responsibility should fall. From the view which the court has taken of this case, the plea of the statute of limitations becomes unimportant. And I should not have felt it necessary to remark upon it, but for the purpose of preventing misapprehension.

The assignment of an open account, or a chose in action not negotiable by mercantile law, or assignable by legislative enactments, vests no legal title or interest in the assignee, who, for this reason, can maintain no legal action on the same in his own name. But it is different in this court, where the assignee may enforce, by a suit in his own name, choses of this character, which have been assigned to him for a valuable consideration; subject, of course, to the equities that subsisted between the original parties. Nor can it be doubted that an assignment from a parent to a child, of choses in action, not assignable at law, and of mere equities, may be supported in this court on the consideration of love and affection. The court can and has enforced such claims, in suits brought in the name of the assignees. But in either case, whether the assignment be made for valuable consideration, or for the consideration of love and affection between parent and child, the *bona fides* of the assignment may become the subject of inquiry in this court, and if, on investigation, that be found wanting,

the court will refuse its aid. It does not follow, unless there be fraud, that the court will affect to set aside the assignment. But if an unconscientious advantage is sought to be taken, the court will withhold its assistance, and leave the party to struggle with his difficulties in the best way he can. In such an event, he would have no other remedy than to prosecute his action at law in the name of the original creditor.

This court is of the opinion that where the assignee of an open account, or of such choses as are the subject-matter of this suit, files his bill in equity against the debtor, to enforce the demand or demands which have been assigned to him, the assignor should be made a party, either complainant or defendant. This, perhaps, may not be necessary when the assignor has parted with his whole estate in the chose, both legal and equitable. But the demands in this account that have been assigned to the complainants are all legal choses; that is to say, they are choses upon which an action may be maintained at law by the party to whom they were originally due. The assignee has a mere equitable interest, while the legal estate remains in the assignor. The assignor should be made a party, therefore, on the general rule that all persons having an interest, legal or equitable, should be made parties to the proceeding. There is something more than form in the enforcement of this rule in cases like the present. It serves to meet and carry out the substantial justice of the case. When a creditor, either by himself or his assignee, files his bill against the defendant for an account, the claim is subject to all equitable discounts which the defendant may succeed in establishing against it. If, on stating the accounts, there is a balance found in favor of the defendant, he is entitled to a decree for such balance. A party praying an account is entitled to it only on the condition that if, on a settlement, he should be found to be a debtor, a decree should go against him for the balance. This is pure equity. And the converse of it would be highly inequitable, and would lead to circuitry of actions and multiplicity of suits. But this wholesome rule of justice could not be enforced, and this responsibility would be evaded, if the assignee were permitted to file a bill for an account without making the assignor a party. The assignee would not be liable for any balance in which the assignor should be found indebted to the defendant. He should, therefore, bring in the assignor as a party, who would be liable for a decree for such balance, and thus prevent the vexation, expense, and de-

lay of another suit, on the part of the defendant; and save the court the trouble of trying two causes where one would answer every purpose. This court is therefore of the opinion that Mrs. Hopkins, the assignor, should have been a party to the bill, either as a complainant or defendant. And further, the court is of the opinion that, being a party, and an interested party, she could not be a competent witness. The assignee would be entitled to any balance that would be found due by the defendant; but it is obvious that the accounting of the defendant would be with the assignor, who would go into the examination subject to the liability of a decree against her if a balance should be found due to the defendant. It would be to the interest of the assignor to swell the amount of her claims against the defendant, and to reduce his against herself. She would, for this reason, be incompetent.

The complainant's solicitor has asked the court, in the event of Mrs. Hopkins being a necessary party, that he be allowed, by an order of this court, to amend his bill, so as to make her a party. This, of course, is equivalent to asking for another trial. It is to be remarked that the defendant has insisted upon the objection as to the want of a necessary party, during the whole progress of this cause. She first filed a general demurrer, which embraced the objection as to the want of parties, where, as in this case, the omission of a proper party appears upon the face of the bill. The demurrer being overruled, she urged the same objection in her answer. She urged it upon the hearing on the circuit, and again on the hearing before this court. During all these successive stages of the litigation, the complainants have persisted in their course, and have not moved to amend for the purpose of making a new party. But, after the final hearing on appeal, they ask, not by motion, but by parol, in the event the court should be of the opinion that Mrs. Sarah Hopkins is a necessary party, that they be allowed to amend. The competency of the court, in the exercise of its discretion to do this, and on its own motion, is not doubted. It would be done on a proper occasion. It was done in *Neely v. Anderson*, 2 Strobb. Eq. 262, where the question was not made in the pleadings, nor discussed in the circuit court. But it was discovered that the case involved the rights of infants, who were not parties. The decision would, of course, not be binding upon them, nor terminate the litigation. Under these circumstances, this court, in the exercise of its undoubted discretion, and on its own motion, ordered the bill to be amended, and the infants to be made parties. When a party has submit-

ted his case, upon a final hearing, to the judgment of the court, he has no right to the privilege of being allowed to amend. He should have done that at an earlier stage of the proceedings; more particularly, where he has been notified by the plea of the adverse party.

But I will now discuss the ground upon which I am more particularly instructed by the court to place its judgment. I have already stated that where there has been an assignment (for valuable consideration, or for the consideration of love from a parent to a child) of legal choses that are unassignable at law, this court will entertain a bill, in the name of the assignee, for the enforcement of such claims; provided, that the assignor be made a party either as a complainant or defendant; and provided also, that there be *bona fides* in the transaction of the assignment. If the object be to obtain an unconscientious advantage over the party to be brought to the reckoning, the court will not lend itself to the enforcement of the inequitable arrangement. It seems to the court that the purpose of the parties to this assignment was not in good faith to the defendant. The object was to obtain an undue advantage, by enabling Mrs. Sarah Hopkins to become a witness in establishing her account against the estate of her deceased son: From the relations between the assignor and the assignees, it did not matter much to her whether she or they got the benefit of this claim. If she wished to make a donation of this amount to her sons, why did she not sue for it in her own name, and after recovery give it to them? It cannot be doubted that the assignment was a mere contrivance to recover, by means of her own testimony, a claim which she could not otherwise recover. The arrangement was in their understanding to have the effect of opening her mouth as a witness, while the lips of the defendant were to remain hermetically sealed. Death had stamped his cold signet upon the lips of the other party to the contract. He could not speak from the grave. If he were living, he would not have been allowed to speak as a witness; but he would know in what manner best to make his defense. If his wife were allowed to speak as a witness, although she was necessarily ignorant of many of the alleged facts, she might have testified to what she stated in her answer, that shortly after her husband's death, Mrs. Hopkins came to her house, and desired to see the account of sales of the preceding year, amounting to one hundred and eighty dollars, stating that her son had not settled for that, but making no claim for the sales of the preceding years.

I allude to this for the purpose of illustrating how little it tends to the development of truth, and the attainment of justice, to receive in evidence the statements of one party to a legal controversy, without receiving those of the other. Just such a state of things has the contrivance of the complainants and their co-laborer produced. Mrs. Hopkins, according to her own statements, had demands against her deceased son. They were demands that were properly cognizable at law, and if she had resorted to that court, she would have occupied her natural and proper position of a plaintiff, and would be bound to prove her case by disinterested testimony. Knowing or fearing that she would not be able to succeed in a court of law, the contrivance of the assignment was resorted to, for the purpose of enabling the case to be brought into this court, where it was supposed she might be a witness. The *mala fides* in the transaction of the assignment, according to the principles which I have before stated, is a sufficient ground for the court to refuse to entertain the complainant's case; more especially, where the claim at best wears a somewhat equivocal character, and it seems that substantial justice has already been done by the decree of the circuit court.

It is ordered and decreed that the decree of the circuit court be affirmed, and that the appeal be dismissed.

DUNKIN, chancellor, concurred.

Decree affirmed.

STATUTE OF LIMITATIONS IN CASE OF MISFEASANCE of attorney begins to run at the time of the misconduct, or when the cause of action accrued: Note to *Beets v. Norris*, 38 Am. Dec. 270, 271. When statute begins to run on money collected by an attorney: See *McDowell v. Potter*, 49 Id. 503.

ASSIGNOR OF CHOSE IN ACTION, WHEN COMPETENT AS WITNESS in a suit thereon: See *Phinney v. Tracey*, 44 Am. Dec. 116, and note, where prior cases in this series on this subject are collected.

AMENDMENT AFTER SUBMISSION OF VERDICT OR JUDGMENT: See *Stevenson v. Mudgett*, 34 Am. Dec. 158, and note; *Zule v. Zule*, 35 Id. 600; *Ryers v. Wheeler*, 37 Id. 243; *Palmer v. York Bank*, 36 Id. 710; *Landry v. Baugnon*, Id. 606.

CASES
IN THE
COURT OF APPEALS AND ERRORS
OF
SOUTH CAROLINA.

CAMERON v. RICH.

[4 STROBART'S LAW, 168.]

CARRIER, TO EXEMPT HIMSELF FROM LIABILITY FOR DAMAGES resulting to goods intrusted to his care must show that such damage proceeded from some cause which was within the exception to his general liability.

GOODS DAMAGED BY DAMPNESS generated by the ordinary operation of natural causes, which might have been prevented by skill and care on the part of the carrier, will render him liable for the damages resulting therefrom.

PRESUMPTION THAT VESSEL WAS UNSEAWORTHY at the commencement of a voyage arises from her defective condition on arriving at port, unless adequate cause be shown to account for such defective condition.

DEFENDANT, master of a vessel plying between Liverpool and Charleston, had, while at the first-named port, undertaken to carry as freight to Charleston a lot of earthenware and hardware belonging to the plaintiffs, acknowledged to be in good condition. The same was stowed in the hold of the vessel, and a quantity of salt in sacks had been stowed above it. Upon the arrival of the vessel at Charleston, it was found that the merchandise consigned to the plaintiffs had been damaged by reason of water and brine, the latter being caused by the drippings of water from the sacks of salt, which had been damaged through the same cause during the voyage. A crest of salt was found on several articles of hardware, and a survey of the vessel having been made, it was found that water was dripping from the seams, oakum was started, and a butt also. Plaintiffs alleged that the vessel was unseaworthy at the time the goods were shipped. Defendant did not introduce any evidence to disprove this charge, but claimed that he was exempt,

as the injury resulted from dangers of the sea. No evidence was adduced to prove that a storm had occurred. Judgment was awarded in favor of the defendant, and plaintiffs appealed.

Northrup and Dukes, for the plaintiff.

Hunt and Son, for the defendant.

By Court, WARDLAW, J. The goods were damaged in the course of their transportation. To exempt himself from liability, the carrier must show that the damage proceeded from some cause which was within the exceptions to his general liability. From what cause did it proceed? If from the dripping of the salt (as four of the five port-wardens believed), this was a result of bad storage, and the carrier is answerable for it. If from dampness generated in the hold by the ordinary operation of natural causes, the carrier is answerable for that too, because by skill and care it might have been prevented. If from water admitted by the vessel in her straining during the voyage, then the carrier is not answerable, if this was unavoidably occasioned by storm or stress of weather, but is answerable if it ensued without such unavoidable cause. Stress of weather, as almost every other fact, may be proved by circumstantial evidence sufficiently strong; but when there has been neither evidence as to the condition of the vessel when she sailed, nor evidence as to any storm encountered, seams and bolts found open at the port of delivery raise a presumption that the vessel was unseaworthy when she sailed, rather than that she encountered a storm in her voyage. Even where a violent storm has been encountered, if it cannot be fairly inferred that the damage resulted from the storm, a ship that has turned out to be unfit for sea, without apparent or adequate cause, ought to be presumed by a jury to have been unseaworthy before the commencement of the voyage. This presumption that the unseaworthiness which has been developed, without adequate cause shown, existed at the commencement of a voyage, which has been carelessly called a rule of law, is one of those presumptions of fact which are recognized by the law and recommended to juries as settled conclusions that have acquired an artificial force even beyond their natural influence to produce belief. This presumption ought to have been brought to the view of the jury when their attention was turned to the inferences that might be drawn from the condition of the vessel when her cargo was discharged. In neglect of this presumption the jury have relieved a com-

mon carrier from the burden, which lies on even an ordinary bailee, of showing how the damage was done.

The motion for a new trial is granted.

RICHARDSON, O'NEALL, EVANS, and FROST, JJ., concurred.

Motion granted.

CARRIER'S EXEMPTION FROM LIABILITY.—The burden of proof rests on the carrier to show that a loss arose from a cause for which he was not liable: *Turney v. Wilson*, 27 Am. Dec. 515; and damage done to goods intrusted to a common carrier while in his possession being proved, the burden is upon him to show such cause as will exempt him from liability therefor: *Boart v. Street*, 23 Id. 131. In the case of *Swindler v. Hilliard*, 45 Id. 732, the court held that the burden of proof was on the carrier to show that a given loss was within the exception of the bill of lading, and was not occasioned by negligence. The same rule prevailed where goods which had been shipped under a common bill of lading were damaged on the voyage, and the carrier claimed to be exonerated, on the ground that the damage was caused by the dangers of the seas: *Bearse v. Roper*, 1 Sprague, 331; *The Emma Johnson*, Id. 527; *Hunt v. Cleveland*, 6 McLean, 76. The case of the *Ship Martha*, reported in Olcott's Admiralty, 140, bears a strong resemblance to the principal case, but differs from it in the respect that the question of seaworthiness was not raised. In this case, the libellant shipped three hundred and forty bundles of sheet-iron on freight from Liverpool to New York, receiving a bill of lading that the same was received in good order, and to be delivered in like good order, the perils of the sea excepted; when unladen, it was found to be strained and rusted by wet, and injured thereby, and notwithstanding proof that the iron was well stowed, that the ship came in tight and dry, that the iron was taken on board in dry weather and not exposed to the access of water, the vessel was held answerable for the damage. The burden of proof was upon the ship to show that the damage existed when the cargo was laden on board. In a case determined in Louisiana, where goods receipted for in good order were found in a damaged condition at the end of the voyage, it was held the vessel was presumed to be liable until the injury was shown to have been caused by the act of God, inevitable accident, or public enemies: *Montgomery v. Ship Abby Pratt and Owner*, 6 La. Ann. 410. In the last case, the damage resulted from improper stowage, and what is termed in nautical parlance "sweating of the hold." As to instances where these terms have received interpretation from the courts, see the cases cited in the note to *Van Horn v. Taylor*, 41 Am. Dec. 284.

"DANGERS OF THE SEA" DEFINED.—For a definition of the terms "dangers of the sea" and "perils of the sea," examine the note to *Van Horn v. Taylor*, 41 Am. Dec. 281; *Turney v. Wilson*, 27 Id. 515, and note thereto.

BILL OF LADING.—As to definition of the term and its efficacy as a receipt and contract, see the cases collected in the note to *Chandler v. Sprague*, 38 Am. Dec. 407; and *Wayland's Adm'r v. Mosely*, 39 Id. 335.

MARTIN v. HAMLIN'S EXECUTORS.

[4 STROBART'S LAW, 188.]

WHEN WILL CONSISTS OF SEVERAL DETACHED SHEETS, it is not necessary that each sheet should be separately attested by witnesses as well as signed by the testator.

WRITTEN SHEET, NOT HAVING BEEN SIGNED BY TESTATOR, but connected by the sense and the dependence of it upon another sheet which has been properly signed and attested, will be considered as being a part of the will.

THE testator wrote his will on two separate sheets of paper, one of which was inserted in the fold of the other without having been fastened. The greater portion of the will, on which appeared the attestation of the witnesses and the signature of the testator, was written on the inserted sheet, and on the last page of the outer sheet were indorsed the words: "Last will and testament of Samuel Hamlin." When the will was produced for probate, the attesting witnesses identified it as being in the handwriting of the testator, and the one which he executed in their presence. The plaintiff objected to the admission of the will, for the reason that the sheets which composed the will were detached, and were not signed and attested. The defendants demurred. The court, in sustaining the demurrer, held that "the law does not require that a will should be written on one sheet of paper only, nor if written on more than one sheet that all the sheets should be executed with the legal formalities." Plaintiff appealed.

Northrop, for the plaintiff.

Lesesne, for the defendants.

By Court, WARDLAW, J. In strictness, the question of law presented by the suggestion and demurrer thereto is whether a writing which is on a separate sheet, and not signed by the testator, can be part of a will which has been properly signed and attested. If the separate writing be in existence at the execution of the will, and be referred to by the will and described so that it may be known without mistake, it is incorporated into the will. Of this, there is no doubt, and therefore, according to exact pleading, the demurrer should be sustained.

But the question upon which the opinion of the court has been sought is this: Was there here sufficient proof of the execution of the first sheet to make it part of the will, supposing all the facts stated by the ordinary to have been found by a special verdict? The first sheet was not signed by the testator,

but was at his hand when he signed the other sheet, and was embraced in unequivocal acts of publication. It was not attached to the other sheet by any material ligament, but was connected by the sense and the dependence of one part upon the other, showing that both constituted one whole. There is no single circumstance to induce suspicion, and in all the circumstances distinct evidence of fairness.

The case of *Pearson v. Wightman*, 1 Mill, 336 [12 Am. Dec. 636], contains an opinion of Judge Cheves, that the signing of both sheets by the testator, in such a case, is not requisite; but that opinion is said to be *obiter dictum*. In the case of *Bond v. Seawell*, 3 Burr. 1773, two separate sheets, not tied, pinned, or otherwise attached to each other, were signed on every page by the testator, but only the last sheet was seen by two of the attesting witnesses, and upon it was the attestation. The court was of opinion that if the first sheet was then in the room, it was included in the execution, and that the intention to include it being plain, the jury should be directed to presume that it was in the room.

One signing by the testator, and one attestation only, are required by the statute, and it has never been contended that where there are several sheets every one should be separately attested, but only that every one should be signed. His signing of a sheet which is not attested does not make it a will; it is a safe and prudent means of guarding against frauds, but in a question of execution under the statute it serves only to indicate the intention of the testator to include that sheet in the execution, of which the formalities are written on another sheet. Any other distinct act, indicating the intention, would serve the same purpose, even as to a separate writing not incorporated into the will by references, if the separate writing be present, and the witnesses who attest can prove that it was a part of the general instrument which was signed and executed. In proportion as the identity of the separate paper and the intention to include it are otherwise manifested, may the memory of the witnesses be dispensed with. Where it is exactly described in the attested paper, the separate paper need not be at all known to the witnesses, or present at the time of execution. Where the separate writing is not described, but is strongly connected by sense, and is signed by the testator, the case of *Bond v. Seawell*, 3 Burr. 1773, shows that it is sufficient if the edges of it were seen by the witnesses, and even if, although not at all seen by them, it was actually present.

Shall it, then, it is asked, depend upon the honesty and memory of the witnesses to decide what is the will? As to all those matters which were necessary to the validity of a will at common law, the statute has made no alteration; as for instance, the competency of the testator, his freedom from restraint, his understanding of the contents, the reading of the will to him if he is blind—and as to these, a will, like any other instrument, must depend upon the testimony of witnesses; sometimes of a single witness. The superadded requisites of the statute must be exactly complied with; but the compliance in each particular is a question of fact depending upon witnesses. In the question of attestation is involved the inquiry, What is attested? and that, when the writing is all on one paper, no less than when it is on several papers. It is prudent to attach together in a firm manner, beyond suspicion of unfairness, all the parts of a will or other instrument; and where there is ground for suspicion, or any unusual circumstance, the proof of intention to include both in the execution, and of actual conjunction of them in the act, should be clear to connect detached papers as one instrument. But if, where no unfairness can be suspected, and the union in the intention and act of the testator is manifest, a will must be defeated for want of some material connection of different sheets which have not been separately signed by the testator, then the same result would follow if after execution, as in this case, on the last sheet the testator should, himself, carefully bind the sheets together with tape and wax, and then sign his name on every page, all in the presence of the witnesses who had previously attested the last sheet whilst it was detached; for neither testator nor witnesses can, after the execution, incorporate into a will anything which was not in it at the execution, without a renewal of the requisite formalities. By some possible freak or accident, separate devises and bequests, unconnected by reference or otherwise, might be written on separate slips of paper, and all being present and included in the intention and act of execution, be presented as a single will; and it might be hard for any witness to say which of these slips was and which was not included in the execution. The prudence of either witness or testator would prevent such a case. On the other hand, cases may be imagined of a sheet which was pinned or otherwise attached to the attested sheet being detached—of a sheet which was signed, being in whole or in part abstracted or altered; of sheets which were signed, but afterwards rejected and not intended to constitute part of the will, being at hand

when other sheets were executed. Frauds may be perpetrated, and the memory of witnesses must be invoked, whatever rules may be adopted. All such cases only present questions of fact. We cannot add to the requisites of the statute, by requiring indispensably that each sheet of a will, that, as a whole, has been properly executed, shall be either signed by the testator, tied to the paper upon which the attestation is written, or authenticated by any other formality which the statute has not prescribed.

The motion is dismissed.

RICHARDSON, O'NEALL, EVANS, and FROST, JJ., concurred.

Motion refused.

WILL WRITTEN ON SEVERAL SHEETS OF PAPER.—In the case of *Ginder v. Fornum*, 10 Pa. St. 98, a will was produced for admission which was written on several sheets of paper fastened together by a string. The court held, upon proof, by two witnesses, of the signature of the testator at the end thereof, that it was admissible. The question whether all the sheets were attached at the time of signing, or whether there has been a subsequent fraudulent addition to the instrument, is a question of fact for the jury.

HABERSHAM v. HOPKINS AND WIFE.

[4 STROBART'S LAW, 233.]

WHERE LEGAL ESTATE IS VESTED IN TRUSTEE, and not in a tenant for life, by express words to preserve and not to destroy nor defeat the remainder, the law will not presume that before such estate was vested, the trustee joined with the tenant in a feoffment to defeat it.

NOTHING DISHONEST OR BASE IS TO BE PRESUMED IN LAW; all presumptions are innocent and rightful; therefore a deed will not be presumed if it could only be in fraud and injury.

TRESPASS to try title. Givens held the property in question from 1811 till his death, in 1843. Mrs. Hopkins, his daughter, succeeded him in occupation. The property was treated by Givens and Mrs. Hopkins as their own. In 1847 the house was burned. During the occupancy of the defendants, valuable trees had been cut down and destroyed. Barnard Elliott, in 1793, made a deed of trust to William Hazard Wigg, his heirs and assigns, forever, "in trust to support and preserve the contingent uses and estate therein, after limited from being barred or destroyed, but so as to suffer and permit the said Barnard Elliott and his assigns to occupy and receive the profits of said premises, to his and their own use for and during the term of his natural life; and from and after his decease to the use of

Catherine Elliott, his wife, for her natural life, without impeachment of waste; and from and after the determination of that estate, or in case the said Catherine should survive the said Barnard, and from and after the death of said Catherine Elliott, in trust to and for the use of such child or children that the said Catherine Elliott may then have living, share and share alike, to them, their heirs and assigns forever." The plaintiff was the only surviving child of Barnard Elliott and Mrs. Catherine Elliott. The latter died in 1844. The question which arose in the case was whether Givens's possession could be regarded as adverse to the plaintiff prior to the death of her mother, Mrs. Elliott. The argument was that the trustee, with the consent of the *cestui que trust*, might have conveyed a good title to a purchaser by a deed of feoffment and livery of seisin, and such would be presumed from the long use and occupation. The court held otherwise, and that Givens did not hold adverse possession until plaintiff's right of possession had accrued, which was not until 1844. Defendant appealed, and moved for a new trial.

E. and H. Rhett, for the defendant.

F. W. Fickling, for the plaintiff.

By Court, FROST, J. The extract from the deed of settlement in the report is incomplete. The lands mentioned in the deed, including the lot in dispute, are released "to William Hazard Wigg, his heirs and assigns, to have and to hold" the said lands "to the said William Hazard Wigg, his heirs and assigns, to the use and behoof the said William Hazard Wigg and his heirs, upon trust, to preserve and support the contingent uses and estate, hereinafter limited, from being barred and destroyed," etc., as set out in the report.

It is clear that the trusts were not executed before the death of Catherine Elliott, and that the legal estate, until that event happened, remained in the trustee.

Where the *cestui que trust* and trustee are both out of possession, for the time limited, the party in possession has a good bar, under the statute of limitations, against them both. The defendant has not relied on nor pleaded the statute of limitations; and it is unnecessary to consider what might have been the effect of the plea.

Whether the trust be executed or not, cannot affect the result of the applicant's motion. If the trust was not executed, the trustee might, by joining with the tenant for life in a feoffment, have defeated the contingent remainder of the

plaintiff, before it came into existence. But to prevent this consequence, Wigg was appointed trustee to preserve the contingent remainder. It was his primary duty to preserve the estate in remainder from being defeated or destroyed, and to combine with the tenant to accomplish that purpose, would be legally a clear breach of trust; and, morally, a breach of confidence. Nothing dishonest or base is to be presumed in law; all presumptions are innocent and rightful; a deed will not be presumed if it could only be made in fraud and injury.

Even if the trusts were executed, the possession of the defendant would not warrant the presumption of a deed from the plaintiff. His possession was not adverse to her title, but entirely consistent with it. If a deed could be presumed at all, it could only be from Catherine Elliott, the tenant for life. A release of all her estate would give defendant no title against the plaintiff.

It is not stated in the report, but was admitted in the argument, that the plaintiff produced a grant for the land in dispute prior to 1785. If a grant could be presumed to the defendant, its issue must be referred to the commencement of his possession. As a junior grant, it would be void against the plaintiff.

The motion is refused.

RICHARDSON, O'NEALL, EVANS, and WARDLAW, JJ., concurred.

Motion refused.

PRESUMPTION THAT TRUSTEE ACTS IN GOOD FAITH.—The rule set forth in the principal case was upheld in the case of *Calvert v. Carter*, 18 Md. 73. In that case, the court held that a trustee of a life estate with remainder over is bound to look after the trust property for the benefit of the remaindermen. And a court of chancery will presume that a trustee acts in good faith, and does not abuse his trust.

SCHMIDT v. RADCLIFFE.

[4 STROBART'S LAW, 296.]

INDORSEE'S PROMISE TO PAY NOTE, MADE WITH KNOWLEDGE OF FAILURE TO PRESENT, is a waiver of presentment.

ACTION against the defendant as the indorsee of a promissory note, dated April 19, 1848, for sixty dollars at sixty days, payable to the defendant or his order, and by him indorsed to the plaintiff. The following February the note was presented to the defendant, who replied to the demand for payment by stating that he would see the maker and "try to get the money

out of him," and if he could not, he would pay it himself. No demand had been made upon the maker of the note, nor presentment to the indorser when the note fell due. Judgment for the plaintiff, and defendant appealed.

Cogdell, for the defendant.

Gyles, for the plaintiff.

By Court, O'NEALL, J. The rule that "a promise by the party entitled to notice, to pay the bill, is deemed a full and complete waiver of the want of due notice," seems now to be settled law. It is, however, subject to the qualification stated in the same section, "in all cases of this sort, the promise must be unequivocal, and amount to an admission of the right of the holder; or the act done must be of a nature clearly importing a like admission of his right." The defendant's first conversation with George Wood seems to me fully to sustain the case under this qualification. For he tells him, on the note being presented to him, "he would see Cramer and try to get the money out of him, and if he could not, he would have to pay it himself, as he was the indorser on the note." This was a plain admission of his liability, and the plaintiff's right to receive the money from him. This is not questioned by the defendant, but it is said, unless he knew, when he made the promise, that he was discharged by the laches of the holder, the promise would not bind him. This may be generally true, and yet not avail the defendant. For if he knew, or must be legally regarded as knowing, the facts (if they existed) out of which his discharge would have followed, then his promise will be binding. The note here was due June, 1848—this promise or admission was February, 1849. If the note had not been presented to the maker, payment demanded, and notice given to the indorser, it would seem that, in seven or eight months, the defendant would have known all about it, especially as the most interesting thing to him was, that these facts should have been communicated to him to fix his liability. It is no answer to say he did not know that there must be a demand of payment from the maker when the note fell due, and notice to him of that fact, and the non-payment, in order to make him liable. If he knew the facts, he is presumed to know the law—mere ignorance of it is no excuse. The true notion is, however, when a man promises to pay a dishonored note, that this is proof that everything necessary to fix his liability had previously taken place; and if he is to have any benefit of his promise being made in mistake, he must show that the antecedent

facts to his liability did not occur, and, therefore, that he was discharged when he made the promise; when if he can show, as in *Lawrence v. Beaubien*, 2 Bailey, 623 [23 Am. Dec. 155], that he was wrongly instructed in the law, and his promise was made in mistake of the law, it may avail him; otherwise not.

Mr. Chitty, in his treatise on bills, says: "A promise to pay, made after a bill becomes due, is considered an admission of a regular presentment for payment and of due notice, or at least waives the objection, because the party must be supposed to have known when the bill became due, and must have actually known, or might readily have ascertained, the fact whether or not there had been laches; and therefore, when such a promise has been made, the plaintiff may avail himself of it, without proving that the defendant knew that the bill had been actually presented and refused." This covers the whole ground, and is a just understanding of the cases decided on this question.

The motion is dismissed.

RICHARDSON, EVANS, WARDLAW, and FROST, JJ., concurred.

Motion refused.

PROMISE BY DRAWER OR INDORSEE to pay a draft, if made with full knowledge that there had been a failure to make due presentment, amounts to a waiver of such presentment: *Hunt v. Wadleigh*, 45 Am. Dec. 106; *United States Bank v. Southard*, 35 Id. 521, and notes.

TAYLOR v. DRAKE.

[4 STROBHEART'S LAW, 481.]

PROMISE TO SIGN NOTE AS SURETY FOR ANOTHER, without consideration, is merely collateral, and is within the statute of frauds, and void.

PROMISE BY THIRD PERSON TO PAY DEBT OF ANOTHER must be in writing. GOODS FURNISHED VENDEE ARE NOT CONSIDERATION between the vendor and a party promising to become surety to the vendee.

ASSUMPSIT. The plaintiffs, auctioneers and commission merchants, sold a bill of goods to Mrs. Owens, but refused to deliver them unless defendant agreed to indorse her note for the amount due. The goods were delivered to Mrs. Owens, and some days afterwards the plaintiffs' clerk called on the defendant to have him indorse the note referred to. This the defendant refused to do. Upon the trial of the cause, defendant's counsel moved for a nonsuit. The motion was overruled, and judgment awarded for the plaintiff. Defendant appealed. The other facts are stated in the opinion.

Phillips, for the defendant.

Simons, for the plaintiffs.

By Court, RICHARDSON, J. The motion is for a nonsuit, upon the ground that the contract made by Miles Drake, to answer for the goods delivered to Mrs. Owens, by the plaintiffs, is within the protection and provisions of the statute of frauds; because such contract was never acknowledged in writing, nor was it made for and upon any sufficient consideration to make it binding upon him. The enactment that governs the case is as follows: "No action shall be brought, etc., whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." The decisions expounding this fourth clause of the statute of frauds and perjuries are very many. But the difficulty is not so much in the law as to perceive and decide what was the exact meaning of the parties in each particular case. In the case now before the court we have to decide:

1. Whether Miles Drake was merely the surety of Mrs. Owens, the principal debtor, for the goods in question, or, was he himself the original debtor for the goods, and Mrs. Owens not liable; and,

2. Whether any sufficient consideration passed to Miles Drake, either at the sale or subsequently, so as to render the contract for the amount of the goods binding upon him, even if he were not the original debtor, and had not bound himself in writing.

The first inquiry is resolved by asking who was the principal and original debtor for the goods. This is a question of fact. Mrs. Owens bid off the goods. The entry in plaintiffs' books was thus: "Mrs. Eliza Owens bought of J. H. & A. Taylor, auction and commission merchants," etc. And the plaintiffs' clerk, J. W. Rice, says he looked on her as the principal debtor. The goods were sold on a credit, and the plaintiffs refused to deliver them to her unless Drake would indorse her note. This Drake agreed to do—whereupon the goods were sent to Mrs. Owens's store, but Drake afterwards refused to indorse the note. Rice says in his cross-examination, "I told Drake I would deliver the goods as soon as he would say he would indorse."

Thus the promise of Drake was explicit, but only verbal. Rice further says whatever was paid was paid by Mrs. Owens.

The particular adjudication of our own that here applies is that of *Leland v. Creyon*, 1 McCord, 100 [10 Am. Dec. 654], i. e., if the person for whose use goods are furnished be liable at all, any promise by a third person to pay that debt must be in writing. This is well illustrated by the opposite case: *Mease v. Wagner*, Id. 895. Where no action lies against the party undertaken for, it is not within the statute.

Now, then, is it not plain that Mrs. Owens was the original, and in the language of Rice, "principal debtor"? The evidence, I think, places her obviously in that position, while it places Drake in the position of a collateral surety, only to answer in case of her default and non-payment. The undertaking and promise of Drake was to become her indorser, which plainly keeps up the proper idea of a provisional and collateral indebtedness for Mrs. Owens, the maker. The legal liability of an indorser, who is a provisional debtor, presents the precise idea of that kind of liability against which the statute would guard men, unless it be put in writing.

The whole wisdom of the statute against frauds is to render nugatory such collateral and provisional undertaking; unless the contract be put in writing or be made for valuable consideration. The law is easily comprehended, and in this particular instance, as I understand it, applies to the case made by the evidence as plainly as the common illustration of the statute of frauds: "Let A have goods, and I will be security that he will pay for them, or if he does not pay, I will." Such an undertaking is collateral and void, by the express protection of the statute against such contracts, unless they be put in writing.

The contract of Drake amounted to this: "Let me have the goods she has bought, and I will indorse her note for the payment. In other words, I will be surety for their amount. But she is still the principal debtor, and I will answer in case of her default." And accordingly the goods were charged to her alone in plaintiffs' books. It can make no difference at what time the goods were sent to Mrs. Owens. The assurance of Drake equally refers to the purchase she had before made, and is therefore equally collateral.

The second inquiry is, whether any sufficient consideration passed to Miles Drake, so as to render him subsequently, or before the sale, liable as the original debtor. A man may make himself liable for the default of another, either by an original undertaking or by a sufficient consideration received, so as to render him liable, but there is none such in the present case. In every case of a delivery of goods there is the same consid-

eration. But these goods are the consideration of the indebtedness of the purchaser, not of the collateral undertaking. To make the goods constitute the two considerations would render the statute nugatory. This distinction gives the reason of that class of adjudications which protect the collateral or provisional debtor in all cases where the principal debtor is liable at all; *i. e.*, the goods delivered to the purchaser cannot be extended also into a consideration to the provisional debtor. Once make the goods delivered serve such double purpose, you strike down the statutory shield at a blow.

The case is well illustrated by the opposite and very recent decision in the case of *Samuel Tindall v. T. T. Touchberry*, 3 Strobb. 107 [49 Am. Dec. 637]. In that case a constable levied on the mare of one June. Touchberry agreed, if he would allow June to have the possession of the mare, he would be liable if not redelivered to the constable on the next day. This was held to be an original agreement by Touchberry. For, although made for the sake of June, June was not liable; and therefore the case was not within the statute of frauds, because the whole credit was given to Touchberry. It was like the common illustration, "Let A have goods and I will pay for them." This was an original promise.

But if June had been liable, as is Mrs. Owens, Touchberry would have been shielded by the statute, and the decision reversed. In any case wherein the presiding judge has refused a nonsuit, it is with hesitation that I differ from him in the consideration of the evidence. But in the present case, it is plain that the judge hesitated to grant rather than that he refused the motion—choosing to leave the nonsuit to a higher tribunal. Upon the whole, therefore, this court is of opinion that the proper construction of the promise and undertaking made by Drake was collateral, and as surety for Mrs. Owens, because she was herself clearly liable for the amount of the goods, and the undertaking of Drake was merely provisional; and being without consideration, is protected by the statute of frauds.

The motion of the defendant to set aside the verdict and to enter a nonsuit is therefore granted.

O'NEALL, EVANS, FROST, and WARDLAW, JJ., concurred.

Motion granted.

AGREEMENT TO PAY DEBT OF ANOTHER MUST BE IN WRITING: *Bucklin v. Bucklin*, 13 Am. Dec. 726, and note 730; *Carville v. Crane*, 40 Id. 364, and note.

CASES
IN THE
COURT OF APPEALS
OF
SOUTH CAROLINA.

AIKEN v. PEAY'S EXECUTORS.

[5 STEPHENSON'S LAW, 15.]

IF ONE OF SEVERAL SURETIES PAYS DEBT, he is entitled to demand contribution from his co-surety for whatever he has paid more than his aliquot part.

WHERE ONE OF SEVERAL SURETIES PAYS DEBT, and his co-surety dies before judgment, he may sue the executors of the deceased for contribution.

INTEREST IS RECOVERABLE WHEN INDEBTEDNESS IS FOUNDED ON MONEY TRANSACTION, as where money is lent or advanced for the use of another, or had and received for another's use.

BILL brought by surety against the executors of his co-surety for contribution. A. F. Peay and D. Aiken were the sureties of N. Ford on a joint and several bond made in favor of J. Kirkpatrick & Co. Peay died, and an action was brought and judgment rendered against Aiken and Ford as survivors. Ford's property was sold, and after the older claims had been satisfied, the balance was applied to this case, which was paid by Aiken. Aiken subsequently brought suit against the defendants, the executors of Peay's estate, to recover from them the half of what Aiken had paid on account of the suretyship, together with interest on the same from the date of payment. Defendants pleaded that the liability of Peay was extinguished by his death, and that plaintiff's right to recover rested on a presumption of law. Judgment was awarded in favor of the plaintiff, and defendants appealed.

McDowell and Boylston, for the plaintiff.

Boyce and Black, for the defendants.

By Court, EVANS, J. The questions which have been mainly discussed in this court, and to which the attention of the court has been particularly directed, are: 1. Can the plaintiff call on the executors of Peay for contribution? and, 2. Can he recover interest? As to the other points made in the brief, they are considered as settled by the verdict.

1. As a general rule, there is no doubt that where two or more are sureties for a third person, and one has paid the debt, he is entitled to demand contribution from the others for whatever he has paid more than his aliquot part. This obligation is an implication of law arising out of their undertaking. It is well sustained by all the elementary writers, and the cases quoted by them: Chit. Con. 576, and the cases referred to. But it has been argued that, because Peay died before Aiken paid the money, the remedy at law is gone, and the plaintiff has no remedy but in equity. On joint contracts, if one of the obligors die, the remedy at law is only against the survivors. The principle is deduced from the nature of the contract, and from the fact that the executors of the deceased cannot be joined in an action with the surviving obligor. But the promise which the law implies in the case of sureties is not joint, but several. Each is liable to the others for his aliquot part only, and not for the part of any other of the sureties.

It would seem to follow from this, that where there are three sureties, and one pays the debt, he cannot sue the others jointly, but must sue severally, because if he could, he might compel them to pay for each other, as the judgment would be against both, and any one of them might be compelled to pay the whole. The death of Peay, therefore, does not impair the plaintiff's legal right to sue. The promise to contribute is implied from the relation of joint sureties, and at the time they became so. It was the promise of Austin F. Peay, and devolved on his executors. The bond in this case is said to be joint and several, and if so, the objection has no foundation in fact.

2. It would seem from the authorities that by the English law interest is not allowed on money paid by one of several joint sureties. But we have adopted more liberal rules in relation to interest. In *Cheesborough & Campbell v. Hunter*, 1 Hill (S. C.), 400, a factor recovered interest on money advanced to his customer, in anticipation of produce to be forwarded. The court say in that case, it is the common case of money lent, and the plaintiffs are clearly entitled. The same was decided in *Sollee & Warley v. Meuggy*, Carl. L. Jour. 144. In a great

variety of cases to be found in our reports it has been held that where the indebtedness is founded on a money transaction, as where money is lent or advanced for the use of another, or had and received for another's use, interest was recoverable.

In this case the executors of Peay were liable equally with Aiken, on the promise of their testator; Aiken paid his money in discharge of their liability; it was money paid for them, and they are bound to repay it in discharge of their testator's contract.

The motion must, therefore, be dismissed.

WARDLAW, FROST, and WITHERS, JJ., concurred.

Motion refused.

RIGHTS OF SURETY AS AGAINST CO-SURETY.—A surety may maintain an action against his co-surety and their principal to compel the latter to pay, if able, or to require the sureties to contribute when the principal is unable to pay: *Morrison v. Poyntz*, 32 Am. Dec. 92. And in the same case it was decided that an application by a surety for payment or contribution is not indispensable to recover against a co-surety. In the case of *Rainey v. Yarrowborough*, 38 Id. 681, the court held that if the principal was dead his personal representative could be made a party defendant. The rights of a surety are also treated of in the following-named cases: *Dunn v. Sparkes*, 50 Id. 473; *Wayland v. Tucker*, Id. 76; *Bank v. Fordyce*, 49 Id. 561; *Forbes v. Smith*, Id. 432; *Coombs v. Parker*, Id. 459; *Pratt v. Thornton*, 48 Id. 492; *Rodgers v. McOliver's Adm'rs*, 47 Id. 715; *Blair v. Perpetual Ins. Co.*, Id. 129; *Brown v. Ray*, 45 Id. 361; *Hall v. Cushman*, 43 Id. 562; *McGee v. Prouty et al.*, Id. 409; *Powell v. Mathews*, 40 Id. 427; *McPherson v. Talbot*, 32 Id. 191; *Cage v. Foster*, 26 Id. 265; *Henderson v. McDuffie*, 20 Id. 557.

INTEREST, ALLOWANCE OF.—Interest is recoverable as of right in cases of bonds, written contracts for the payment of money, contracts for the payment of interest, and where the money claimed has been actually used: *Newson v. Douglass*, 16 Am. Dec. 317; *Fridge v. State*, 20 Id. 463.

PUCKETT v. SMITH.

[6 STROBART'S LAW, 26.]

TENANT IN COMMON OF FERRY may maintain an action of account or an action on the case against his co-tenant, to recover his share of the income of the ferry, and all damages may be assessed which have arisen *pendente lite*.

PARTY INJURED IS ENTITLED TO RECOVER for all damages previous to trial whenever it can be shown that the injury is continuous in its nature.

CASE. Thomas R. Puckett, the plaintiff, was the owner of Swansey's ferry. Being deeply in debt, and executions pressing him, he selected such portions of his real estate as he could

best spare, among which was the ferry named. At the sheriff's sale, held on the fifth of February, 1849, two thirds of the ferry was purchased by William S. Smith, the defendant, who entered into possession the following day. The deed of sale, however, was not executed until the first of March following. The plaintiff about a week after the sale demanded possession of the ferry, and the defendant refused to give it up. The plaintiff brought suit, and a writ was issued on the twenty-eighth of February. At the trial, the court stated that the sheriff could not legally seize and sell the ferry, and the plaintiff therefore was entitled to recover; and the jury were instructed that the plaintiff was entitled to damages up to the date of the issuance of the writ—a period of twenty-one days. The jury awarded the plaintiff a sum greatly beyond the amount of damages which the court stated he was entitled to, whereupon defendant appealed, and moved for a new trial.

McGowan, for the plaintiff.

T. Thompson, for the defendant.

By Court, FROST, J. The jury found for the plaintiff one third of the gross income of the ferry, from the time the cause of action accrued to the trial. This is the full extent of the plaintiff's just claim. The only question which it is necessary to decide is, whether, in this action, the plaintiff can recover more than his share of the income of the ferry which the defendant received before the commencement of the suit. In *Pepoon v. Clarke*, 1 Mill, 137, which was an action of ravishment of ward, to establish the freedom of a slave, by the verdict, hire was allowed to the time of trial. Johnson, J., delivering the opinion of the court, says: "Whenever the injury is in its nature continuous, there can be no question that the party injured is entitled to recover for all damages previous to the trial. If it were otherwise, for injuries of this character the action must be brought for every hour of its continuance; or the remedy would not be adequate, and thus create that multiplicity of actions which the law so much abhors." This rule governs other forms of action. In trespass to try title, in trover, in *assumpsit*, on interest-bearing demands, damages are recovered to the time of trial. A different rule might be adopted, but it would be arbitrary. The only difference would be that if damages, after the commencement of the action, cannot be recovered, a second suit would be necessary; but if they are allowed to the time of trial, a complete remedy

is afforded by the judgment for all the previous injury which the plaintiff had sustained. The case of *Duncan* ads. *Markley*, Harp. L. 276, is not in conflict with *Pepoon v. Clarke*. There the defendant put a dam across a navigable creek; which was a public nuisance. In consequence, the plaintiff sustained some special injuries to his mill, for which the action was brought. Evidence was admitted of such injuries after the commencement of the suit. A new trial was granted, because there was no necessary connection between the injuries sustained before and after the action was brought. For the public nuisance, which was continued, the plaintiff had no action, but only for any particular injury he had suffered.

By the act of 1827, every charter of a bridge, ferry, or turnpike road shall be in fee-simple, and shall be held by the grantees as real estate. The plaintiff is tenant in common with the defendant, of the ferry. By the statute 4 Anne, c. 16, actions of account may be maintained by one tenant in common against the others, as bailiff, for receiving more than comes to his share and proportion. In a writ of account, the first judgment is *quod computet*; and on such account all articles of account, though incurred since the writ, shall be included, and the whole brought down to the time when the auditors make an end of the account. By the statute of Gloucester, damages are given in real actions, on a writ of entry to recover the specific lands. The statute gives damages generally, without saying till that time; yet the construction on it has been that they shall compute all the damages which have arisen *pendente lite*. Where a man is accountable for money or goods, case lies against him, or account, at his election.

The motion is dismissed.

EVANS, WARDLAW, and WITHERS, JJ., concurred.

Motion refused.

ACTIONS BY AND BETWEEN CO-TENANTS: See note to *Porter v. Heeper*, 29 Am. Dec. 483 et seq.

DAMAGES, AMOUNT RECOVERABLE.—In the case of *Langford v. Owsley*, 4 Am. Dec. 699, the court held that damages were recoverable up to the issuance of the writ, and not to the filing of the declaration, and the *continuanda*, until the filing of the declaration, is ill.

STATE v. FLOYD.

[5 STROBART'S LAW, 52.]

FORGERY IS FRAUDULENT MAKING OR ALTERATION of writing to the prejudice of another.

DISTINGUISHING CHARACTERISTIC OF FORGERY is the crafty fraud and deceit whereby it is designed to injure some one.

ERASING "PART" AND INSERTING "FULL UP TO DATE" IN RECEIPT FOR MONEY IS FORGERY

PROSECUTION for forgery. The defendant, Washington Floyd, was indicted by the grand jury on the charge of forgery. The gist of the accusation was that he had fraudulently altered a receipt delivered to him by Noah Harmon for a certain sum of money paid by him to Harmon, by obliterating the word "part" therein and inserting therefor the words "full up to date." The indictment contained four counts, viz.: 1. That the defendant did forge the receipt described, *cont. form. stat.*; 2. That he did utter and publish the forged receipt, knowing, etc., *cont. form. stat.*; 3. That he did falsely "make, forge, and counterfeit" an acquittance for money described, *cont. form. stat.*; 4. That he did falsely alter the receipt described by obliterating "part" and inserting "full up to date." Through some inadvertence the conclusion to the fourth count was omitted, so that neither of the expressions "contrary to the form of the statute in such cases made and provided," nor "against the peace and dignity of the state," appeared in it. The defendant pleaded not guilty, and rested his case upon the close of the testimony offered by the state. The jury found a verdict of guilty, and defendant appealed.

Fair, for the state.

Irby and Jones, for the defendant.

By Court, WITHERS, J. The point raised by the first ground of appeal we hold to have been definitely settled, that is to say, Noah Harmon was a competent witness in this case.

The question presented by the second ground for a new trial, which complains that the defendant was arraigned and tried for a felony, under statute, whereas the defense was no more than misdemeanor, is not properly a question on the case; for it was no matter of objection on the circuit. The defendant has, certainly, taken no prejudice thereby; quite the contrary.

The material legal questions arising in the case we take to be: 1. Was the alteration of the receipt, imputed to the defendant, the offense of forgery under our statute law? 2. Was

the offense of such forgery, or of uttering and publishing the instrument knowing it to be forged, legally set forth in the indictment?

The receipt was in these words: "Received, January 29, 1848, of Washington Floyd, twenty-one dollars and fifty cents, for work done in 1847, in full up to date. (Signed) Noah Harmon."

The jury have found that, after the receipt was executed, the defendant deceitfully and fraudulently struck out the word "part," and wrote, in lieu of it, the words "full up to date."

The first question is, Was this forgery? or does it import that the defendant did "falsely make, forge, and counterfeit" an acquittance or receipt for money, with intent to defraud Noah Harmon? The equivalent question is, Was the alteration, above specified, falsely making and forging the receipt set forth?

Our statute of 1736, embracing the description of papers in question, is borrowed from 2 Geo. II., c. 25, and it does not use the word "alter" in relation to acquittances or receipts. That word is introduced in imitation of another British statute, in relation to other descriptions of writings. It is argued hence, that as to receipts, the forging, or counterfeiting, or falsely making thereof, must be held to mean the entire instrument of writing; that, at any rate, a forging by alteration must be alleged to be by alteration; and that proof of such forgery does not sustain a general charge of forging the whole paper.

This conclusion we must reject. It is consistent neither with sound reasoning on general principles, nor with adjudged cases.

The distinguishing characteristic of forgery is, the crafty fraud and deceit whereby it is designed to injure some one; an offense which, when perpetrated through spurious writings, was noticed by the common law to a very considerable extent, as may be seen in the well-considered case of *King v. Ward*, 2 Ld. Raym. 1461. Many statutes have been passed, not so much, though partly to be sure, to enlarge the range of the common law as to the description of instruments that should be protected against the cunning perpetrators of this offense, as to increase the weight of punishment that should follow conviction. Accordingly, the statute of 5 Eliz., c. 14, punished with death the forging of certain instruments, which it was an offense to forge at common law. In proportion as the advances of trade and commerce have invested certain instruments in writing, formerly known, or more recently called into existence, with a consequence specially affecting individ-

ual and general interests, statutory provisions have drawn them within special protection; and such has been the legislative policy of England and South Carolina. Now, in regard to the subject-matter of this indictment, the mischief is just as fully and conveniently perpetrated by one of various alterations, as it could be by fabricating the whole instrument. A note or a receipt is either genuine or it is not. If it be falsely and fraudulently altered in a particular making, it speaks a different language, calculated to produce a different result in its operation, to the prejudice of some one who is designed to be defrauded or injured thereby. The instrument thus abused is not that of the party whom it purports to bind; it was not made by him—but, to every reasonable intent or purpose, it is made by the person so altering it—if fraudulently so made, it is forged by him: and, in the reason of the thing, there can be no difference whether the word “forge” be spoken by a statute or the common law. This is true even in the technical sense, for if a party be sued on such an instrument, a plea of the general issue, implying that he never made it, that it is not his note or bond, for example, would be sustained by proof of an alteration in an important particular.

The authorities re-enforce the general reasoning, and we believe they are, in turn, well sustained by it. *Dawson's Case*, 2 East P. C. 978, which is derived by Foster from Lord King's MS., was decided as early as 3 Geo. I. He was indicted under the 8 & 9 Wm. III., c. 20, sec. 26, intended to protect the Bank of England, and punishing with death any person convicted of “forging or counterfeiting the common seal of the corporation, etc., or any bank note of any sort whatsoever, signed by the said governor,” etc. The indictment laid a forgery of the whole bank note: the proof was that he altered the figure “2” to “5,” so as to make five hundred and twenty pounds instead of two hundred and twenty pounds. The ten judges held that this was forging and counterfeiting (*fabricavit et contrafecit*, was the language of the record, *vide* 1 Stra. 19), forgery being the alteration of a deed or writing, in a material part, to the prejudice of another, as well as where the whole deed or writing is forged: that was not law in this respect; for *non assumpsit* might be pleaded to such a note.

This was followed and reaffirmed by *Teague's Case*, 2 East P. C. 979, decided in 1802, and under the statute 7 Geo. II., c. 22, which used the word “alter,” as well as “forge.” And although Teague was convicted of uttering and publishing, yet it was for uttering and publishing a “forged” bill, which by

the proof was only "altered" from ten pounds to fifty pounds; and upon the point raised there, as it is here now under consideration, all the judges held that the indictment was good in stating that Teague forged and uttered, knowing it to be forged. It is palpable that nothing can be drawn from the conviction, under the second count, except that altering is forging, for, if not, Teague did not utter a forged bank bill. These two cases show that whether the language be "forge," or "forge and alter," the result is the same. It may be that when the party is charged with "altering," where that word is not in the statute (as it is not in ours respecting the paper now in question), it may be necessary to allege, also, enough to show that the alteration is, in some particular, calculated to work deception, fraud, and injury, and consequently in some material particular.

The principle of the cases of Dawson and Teague has been reaffirmed at a recent period in England. The indictment charged that the prisoner did feloniously forge a certain receipt for money, which was copied. It was a receipt of the high constable to the church wardens and overseers of a parish for their share of county poor-rates. In its genuine form it specified the sum of three pounds five shillings and nine pence. The defendant had altered five shillings to fifteen shillings. It was held (upon objection that the receipt was altered and not forged), that the defendant had forged the paper, as charged, although the language of the statute was, "If any person shall forge or alter," etc. It is well to remark here that the offense was charged as a felony, although the punishment was to be transportation for life, or for a term not less than seven years, or imprisonment for a term not exceeding four nor less than two years.

It is not doubtful that the best interpretation of a statute is to construe it as near to the rule and reason of the common law as may be, and by the course which that observes in other cases. This has been familiar judicial language at all times. By the common law, as interpreted by Blackstone, 'forgery is the "fraudulent making or alteration of a writing, to the prejudice of another's right." We have no reason to distrust the definition, since many text-writers of good repute have adopted it; and it has been sanctioned by our own court in the case of *State v. Waters*, 3 Brev. 507. Now, when our statute uses the word "forge," why shall we give it an interpretation more restricted than that adopted and taught by the common law? Why shall we hesitate to follow the light of the cases

already cited, often approved, and fortified by considering that it is our duty to advance the remedy where the obvious mischief to be cured invites its application?

We cannot favor the notion that the act of 1845 intended to abrogate anything in our statute-book, previously of force, on the subject of forgery, except only the measure of punishment. It was necessary to make a recitation of the classes of offenses, under the general head of forgery, in several acts, to which, severally, the mitigated and substituted penalty was to apply. It spoke of offenses under the law then existing, and of convictions afterwards to be had under the same law. The definition of the offenses respectively, and the declaration that they were such, have been left precisely as they were before.

2. What has been already said prepares us to give an answer to the second question to be discussed, touching the form of the indictment. It seemed, indeed, hardly to be contested that if altering was forging, in the sense of the statute, the indictment was sufficient. The offense, in the present case, is charged in the words of the statute. The form is such as is recommended by Archbold, in his Criminal Pleading; it complies with the instruction of Chitty as follows: "In all indictments for the alteration of a written instrument, where the act does not expressly provide for altering, the offense should be charged as a forgery in the words which the legislature have employed. And even though the act has the word 'alter' as well as 'forge,' the offense may be laid as if the whole instrument had been counterfeited, for any alteration of a material part is a forgery of the whole; but it is more usual, at least, in one court, to state the particular alteration charged as criminal." East, in his Pleas of the Crown, observes: "But the indictment need not state the manner in which the party is to be defrauded, for that is matter of evidence." He cites cases to support the doctrine. This rule must follow as a consequence. To alter the paper is to forge it entire: that is declared to be the offense, if done to deceive. When the forgery, therefore, is announced with the allegation of the intent, the offense is completely described.

It may become a very material question in evidence, whether the intent was to deceive any one, and the fitness of the crafty means employed to work that result must be shown in the proof. Hence it becomes important for the state to show the materiality of the alteration towards the end of fraud and imposition; but the *modus operandi* in that respect is no necessary part of the indictment. How that question might be as

at common law we have not stopped to inquire; for we hold this party to have been charged with a statutory offense.

The conclusion is that the indictment is in law sufficient. Yet the court has determined to award a rehearing to the defendant. Nor is any inference to be deduced from this of the opinion of this court upon the facts. We are not forgetful of the degrading punishment to which the defendant is now liable, and our only aim is to afford an opportunity to recommit his case to a jury, in deference to the grave doubts entertained by the judge who presided at the trial.

A new trial is therefore ordered, without prejudice.

EVANS, WARDLAW, and FROST, JJ., concurred.

THE PRINCIPAL CASE IS CITED, *arguendo*, in the case of *State v. Rose et al.*, 8 Rich. 20.

FORGERY, WHAT IS.—To constitute forgery, the instrument must be such, when forged, as to tend to prejudice the rights of another: *Barnum v. State*, 45 Am. Dec. 601; and to sustain an indictment for forgery, an intent to defraud must be averred and proved: *Id.* See note to same, page 605, and the following cases: *Arnold v. Cost*, 22 Id. 302, and note 311; *People v. Fitch*, 19 Id. 477; *State v. Washington*, 1 Id. 601.

RAMBO v. METZ.

[5 STROBHAET'S LAW, 103.]

INDORSER CAN RECOVER ON COMMON COUNT OF INDORSER AGAINST MAKER in an action against one of the parties who made the note.

FORGERY OF NAMES AHEAD OF INDORSER, or any other fraudulent act of the maker to whose order a note was made payable upon the indorser, will not affect a *bona fide* holder without notice before the note became due.

ASSUMPSIT on a joint and several promissory note for fifteen hundred dollars, dated February 22, 1847, and payable twelve months after date to the order of W. M. Bobo, one of the makers, and indorsed by him in blank. The note was signed by W. M. Bobo and C. D. Bobo, as principals, and B. B. Foster, W. B. Murphy, John A. Metz, and B. G. Rice, as sureties. During the trial it was ascertained that the plaintiff, being compelled to raise funds to pay a certain debt, and being also desirous of purchasing the Hamburg Journal, applied for aid to the defendant Metz and his co-surety Rice. They refused to become his sureties unless he would obtain good names ahead of theirs. He subsequently returned with the note to the defendant, who, upon inspecting it, and believing the previous signatures to be genuine, signed it. W. M. Bobo applied

to Albert G. Rambo, the plaintiff, who advanced him a certain sum on the note, and subsequently it transpired that all of the signatures ahead of Metz's, except W. M. Bobo's, were forged. No presentment was made, but defendant stated that after the note became due he would pay it. The court held that the forgery of names ahead of defendant's, or other fraud practiced by W. M. Bobo upon the defendant, could not affect the plaintiff, who became a *bona fide* holder before the note became due. A verdict was rendered in favor of the plaintiff, and the defendant appealed.

Gray and A. W. Thompson, for the plaintiff.

Herndon, for the defendant.

By Court, WARDLAW, J. In the case of *Glenn v. Sims*, 1 Rich. L. 34 [42 Am. Dec. 405], Glenn, with fifteen other persons, executed a joint and several note, under seal, payable to himself; in an action by his administratrix against Sims, one of the fifteen, it was held that the administratrix had no higher rights than her intestate, and that he could not have maintained any action on the specialty, because he united in himself the characters of both obligor and obligee, so that if he only did what he promised, the obligation was fulfilled. It may be conceded that his assignee, like his administratrix, would have been subject to the same objection which would have prevailed against himself.

Relying on that case, the defendant here argues that W. M. Bobo, being both payee and one of the makers of this joint and several instrument called a promissory note, could not have maintained an action thereon against this defendant, who is another of the makers and a surety of the said W. M. Bobo; and therefore that the said W. M. Bobo could not, by his indorsement, transfer a right of action to this plaintiff. But between specialties and those commercial instruments, to which, from considerations of policy, peculiar negotiability has been given, there is a wide difference. As to the latter, it by no means follows, because a right did not belong to a payee, that one claiming through him may not possess it. A strong instance to the contrary may be seen in this very case; for, by abandoning his second ground of appeal, the defendant acknowledges that an innocent indorsee is in no wise affected by a fraud, which would have defeated an action by the payee.

Is the instrument in question one that is entitled to the advantages of a commercial instrument? It is not doubted that, in a bill of exchange, the drawer and drawee may be the same

person, as very clearly drawer and payee may be the same. It could scarcely be denied that an instrument, in the form of a bill of exchange, wherein drawer, payee, and drawee were all the same person, might, in the hands of an indorsee, be treated either as an accepted bill or as a promissory note. Therefore, the plaintiff might well have declared on this paper as a bill of exchange drawn by W. M. Bobo in favor of the plaintiff, and accepted by the defendant.

But the plaintiff has declared on it as a promissory note; and it is objected that it is not embraced by the statute of 3 and 4 Anne, c. 9 (from which promissory notes derive their right to be negotiated and sued, as inland bills of exchange may be), because it is not payable to any other person, but to one of the persons who made it.

The case of *Edis v. Bury*, 6 Barn. & Cress. 433, incidentally recognizes such an instrument as a promissory note; and various American cases have expressly decided it to be so. To these, notwithstanding the argument that has been here urged, may be added the case of *Smith v. Lusher*, 5 Cow. 688, for that case depends, not on any peculiar statute of New York, but only on the statute similar to the statute of Anne, as may be seen in *Plets v. Johnson*, 3 Hill (N. Y.), 113, where a peculiar statute is invoked to authorize an action by a holder, without indorsement, of a note made payable to the order of the maker.

The question has, however, of late, undergone the examination of the various benches in England. The court of exchequer, in *Flight v. McLean*, 16 Mee. & W. 51, sustained a general demurrer to a count, indorsee against maker, on a note payable to the order of the maker and indorsed to the plaintiff, upon the ground that such an instrument was not a promissory note within the statute of Anne. Afterwards, the question came before the queen's bench in *Wood v. Mytton*, 10 Ad. & El., N. S., 808, and there, in a contrary decision, this view was taken of the statute. "The first section consists of a preamble and four clauses of enactment. The first of these clauses contains a description of promissory notes by certain requisites, and then a description of the payee, which includes only any other person—the clause is confined to notes not indorsed, provides for all payees that can claim, and the restricted description of the payee operates as no restriction in fact. The second, third, and fourth clauses relate to the indorsement of notes. The second enacts that any such note payable to any person or persons, his or their order, shall be indorsable as a bill of exchange.

This clause, by the word 'such,' adopts the description of requisites for a note in the first clause, and adds a different description of payee extending to any person. It includes, therefore, in terms, notes payable to the maker or his order, as well as notes payable to other persons, for if the former description of payee was intended to be incorporated under the word 'such,' the additional description of payee would be, not only superfluous, but incorrect." The same construction was applied to the third and fourth clauses, which give the right to payee and indorsee to sue upon such note—interpreted to mean a note of the requisites before mentioned, with the new description of payee, that is, payable to any person or persons, his or their order.

Subsequently, in *Hooper v. Williams*, 12 Lond. Jur. 270, the court of exchequer attained the same result as the queen's bench, by a different process. There the note was payable to the maker's order, by him indorsed in blank to J. K., who indorsed to the plaintiff—declared upon as made payable to bearer and delivered to J. K., who indorsed to the plaintiff. Questions: Could such an instrument be sued on after indorsement? Is there a variance? The construction of the statute made in the queen's bench was disapproved. "As we think, the statute was intended to make those instruments to which it had previously given an obligatory effect between the original parties, transferable to third persons, so as to enable them to sue upon them as upon the transfer of bills of exchange." However, "it is well settled that no particular form of words is necessary in order to constitute a promissory note. What, then, is the meaning of the instrument in question? Before the indorsement, it may be considered to be a promise to pay one hundred and fifty pounds, two months after date, to the person to whom the maker should afterwards, by indorsement, order the money to be paid; such indorsement being intended to have the same operation as if put upon a complete note. If, then, the indorsement should be to a particular person, or to A. B., or his order, and if in blank, it would be payable to bearer, in like manner as a sum secured by a complete note would have been, by similar indorsements. . . . It appears to us, then, that the instrument in this case was, when it first became a binding promissory note, a note payable to bearer, and consequently was properly described in the declaration." The court of common pleas delivered judgment in two cases not yet reported, *Brown v. De Winton*, 6 Dow. & L. 62, and *Gay v. Lander*, Id. 75, in perfect accordance, both in the result

and in the reasons given, with the judgment of the court of exchequer in *Hooper v. Williams, supra*.

It seems, then, to be well established that the plaintiff might, in the case before us, have declared as bearer of a promissory note. Not adopting that form, if his count had set out a note payable to the order of W. M. Bobo, one of the makers, and indorsed by him to the plaintiff, it would have clearly amounted to an allegation of a note payable to the plaintiff, who became indorsee. Such it in fact is, and was intended to be. The words used in the note are "the order of W. M. Bobo." Where the action is brought by the person to whose order a note is payable, the legal effect of such words is held to be the same as if they were to him "or order;" but the natural signification is the person to whom he shall, by his indorsement, give order, and this signification will prevail, where it consists with the intention and rights of parties.

But the plaintiff here has by his count alleged that the defendant made the note payable to W. M. Bobo or order, that W. M. Bobo indorsed it to the plaintiff, and that thereby the defendant became liable to pay to the plaintiff. To this count only, inquiry is now directed; for the defendant received nothing and cannot be made liable on the count for money had and received, and the special count has not been exhibited to this court. The count in question is good upon its face, for it does not disclose that the payee was one of the makers. The same evidence which shows that, shows also his indorsement. The effect is not to invalidate the instrument, but to convert it into a note by the makers to the person called the indorser; and even if it was no note whilst it remained in the hands of the maker, to whose order it was payable, the description in the count, instead of a variance, becomes only a paraphrastic statement of the legal result. The count here (after it was shown that the note was payable to the order of a maker) became, in substance, the same as that in *Wood v. Mytton*, 10 Ad. & El., N. S., 805.

The same conclusion, it will be seen, would have been deduced if the note had been given, in the course of some awkwardly arranged business transaction between W. M. Bobo and the defendant, and had really been made payable to W. M. Bobo or order; for to sustain the count, "W. M. Bobo or order," and "the order of W. M. Bobo," must be regarded as convertible phrases. The latter phrase, however, and the manifest intention of all the makers, that this note should be

discounted for the accommodation of W. M. Bobo, make the plaintiff's right to recover upon the instrument more plain, if they in no way help the count in which he has set forth his case.

The motion is dismissed.

EVANS, FROST, and WITHERS, JJ., concurred.

Motion refused.

NATURE AND EFFECT OF INDORSEMENT.—A person indorsing a negotiable instrument guarantees the ability to pay and the genuineness of the signatures of all prior parties: *State Bank v. Fearing*, 28 Am. Dec. 265, and note to same; *Weakly v. Bell*, 36 Id. 116. In the case of *Hamilton v. Pearson*, 50 Id. 480, it was held that in an action against an indorser of a note, it is not necessary to prove the execution of the note; for even if the note is a forgery, the indorser would be liable on his indorsement.

JONES v. BURR.

[5 STROBART'S LAW, 147.]

SALE OF GOODS UNDER EXECUTION IS SATISFACTION of the *fi. fa.*, even though the goods do not belong to the judgment debtor, and though the real owner afterwards recover the value of them from the sheriff and judgment creditor.

MOTION by the plaintiff for an order to set aside entry of satisfaction which had been made on a *fi. facias*, and to authorize him to have further execution. In 1844 Bartlett & Co. set up a store in Camden, under the superintendence of Aaron Burr. Abram D. Jones, the plaintiff, had a judgment against Burr. In December, 1846, Sheriff Levy, by direction of Jones, levied a *fi. fa.* on some of the goods in the store as Burr's property and sold them. The execution being returned unsatisfied, a further levy was made. Bartlett & Co. brought several actions of trespass against Jones and the sheriff for the amount of the goods sold, and recovered. The plaintiff Jones then made a motion for an order to set aside the entry of satisfaction which had been made on the *fi. fa.*, and to authorize him to have further execution. The court denied the motion. Plaintiff appealed, and prayed the court to treat the entry of satisfaction indorsed on the *fi. fa.* as a nullity.

Smart, for the plaintiffs.

Chesnut, contra.

By Court, FROST, J. In *Perry v. Williams*, Dudley, 44, the plaintiff ordered the sheriff to levy on certain slaves, as the

property of defendant, which the sheriff (being indemnified by the plaintiff) did levy and sell; and the plaintiff became the purchaser. His purchase exceeding the amount of his execution, it was satisfied. The owner of the slaves, having recovered the value of them in an action of trespass against the sheriff, the plaintiff was compelled to refund the value of the slaves purchased by him, and applied in satisfaction of his execution. The plaintiff brought *sci. fa.* against the defendant to vacate the satisfaction and give him a new execution. Judgment was given for the defendant, on the ground that there was no warranty in sheriffs' sales. If a stranger had purchased the slaves, and the value had been recovered against him, in an action of trover by the owner, the purchaser could not recover from the defendant in execution the price he had paid. The plaintiff, purchasing, was held to be in no better condition than a stranger. The plaintiff's execution was satisfied, though the slaves he had taken in payment were recovered from him.

This case cannot be distinguished from that. If Jones and Hughson had purchased the property which they ordered to be levied and sold, and Bartlett had recovered against them, they could have had no reclamation against the defendant. But strangers purchased. If Bartlett had brought trover and recovered against them, they would have had no right of action against the defendant, nor against the plaintiffs. In that case, the plaintiffs would retain, in payment of their execution, the money paid to the sheriff by the purchasers, and the latter would be the losers. This is a common case of the application of the rule that there is no warranty at sheriffs' sales, and excites no surprise nor doubt.

But the application of the rule is not so obvious when it is made directly between the plaintiff and defendant, on account of the apparent contradiction of satisfaction, without payment. Yet this occurs when the plaintiff's execution is satisfied by the purchase of property, and it is recovered from him by the owner. The person whose goods are wrongfully sold may have his remedy against a stranger who has purchased, to recover the value, or against the plaintiff and sheriff, for the wrongful taking. When the defendant is not held to warranty in favor of an innocent purchaser, still less can he be held to warranty in favor of the plaintiff, by whose agency the property has been tortiously sold. The plaintiff levies and sells at his own risk and with notice that the sales will be applied in satisfaction of his execution, though he may be made respon-

sible for damages, if he has tortiously sold the property of another person as the property of the defendant. The rule that there is no warranty in sheriffs' sales, must be enforced in favor of the defendant, against the plaintiff, as much as against strangers. What right of action can Hughson and Jones have against Burr, to be reimbursed the damages which Bartlett has recovered against them? Burr had no agency in their trespass when they seized and sold Bartlett's goods. On the contrary, he protested against the proceeding. The effect of vacating the satisfaction is a summary recovery of indemnity to the amount of their execution by Hughson and Jones against Burr. If they have no claim against Burr for indemnity, they should not be enabled to recover it by granting the motion to vacate the entry of satisfaction and give the plaintiff a fresh execution against him.

The motion is dismissed.

EVANS, WARDLAW, and WITHERS, JJ., concurred.

Motion refused.

VACATING SATISFACTION OF JUDGMENTS, WHEN TITLE OF PURCHASER AT EXECUTION SALE FAILS.—An execution may be returned satisfied, and yet it may turn out that no actual satisfaction has taken place. This may happen when the property sold was purchased by the plaintiff, but did not belong to the defendant, and the plaintiff has therefore been compelled to account for it to the true owner. Freeman on Judgments, sec. 478, in treating upon this topic, says: "In some states, a sale of property under execution, until vacated or set aside, is, to the extent of the sum realized, an absolute, irrevocable satisfaction of the judgment; and if the law provide that in case the purchaser's title, through any defect, fail, he may have an action against the defendant in execution, the rule is the same. The judgment cannot be revived. The purchaser must pursue the remedy given by the statute. He cannot proceed by action on the judgment. If the plaintiff proceed under a valid judgment, but upon void process, and thereby produce a satisfaction of his judgment, he may, on account of the void character of the process, be compelled to restore to the defendant the property taken under the execution, or to account for the proceeds thereof. In such case, it is evident that the satisfaction of the judgment has been produced without any gain to the plaintiff or any loss to the defendant. The former may, therefore, on motion made to the court wherein the judgment was rendered, have the satisfaction set aside; and be allowed a new and regular execution with which to enforce his judgment. But the execution, judgment, and sale may all be perfectly regular, but the defendant may have no interest whatever in the property sold. In such case, if the plaintiff be the purchaser, a satisfaction is also produced without any resulting benefit to the plaintiff, or any detriment to the defendant. The question then arises, Is this satisfaction irrevocable? Or may the plaintiff have it vacated and procure a new execution? Upon this question the authorities are quite evenly divided, and are clearly irreconcilable. On the one hand, it is insisted that as 'the maxim *caveat emptor* applies to all purchasers at sheriffs' sales,' the purchaser takes all risks; and,

therefore, that he cannot have the sale, and the satisfaction thereby produced, vacated on account of the failure of defendant's title. On the contrary, it is claimed that 'the doctrine of *caveat emptor* has its legitimate force in precluding any idea of warranty by the defendant in execution, or by the sheriff; and, therefore, that it interposes no obstacle to prevent the plaintiff from obtaining that relief to which, upon principles of natural justice, he seems entitled.' "

In Pennsylvania, the rule of *caveat emptor* has been followed in a very large number of cases, and the opinion of the court expressed in such language that its import cannot be mistaken. In *Freeman v. Caldwell*, 10 Watts, 9, a case frequently cited by the advocates of this doctrine, the court held that a judgment was satisfied by a levy and sale of goods to its amount under a *feri facias*, although the title of the plaintiff who was the purchaser thereof be subsequently defeated in an action of replevin; and Gibson, C. J., who delivered the opinion in the case, went a step further and stated that, "without power derived from a statute, therefore, I take it that execution cannot be repeated; and though the clear common-law principle may be violated, it cannot be evaded. . . . The plaintiff's case may be a hard one; but it is not more so than would be the case of a stranger, and to say that every sheriff's vendee who is deprived of the property by title paramount shall have his money again, would destroy all confidence in the stability of judicial sales." In *Smith v. Painter*, 5 Serg. & R. 225, the judge, pronouncing the opinion of the court, said: "The sale of the sheriff excludes all warranty. The purchaser takes all risks. He buys on his own knowledge and judgment. *Caveat emptor* applies in all its force to him. If this was not the law, an execution, which is the end of the law, would only be the commencement of a new controversy."

In *Munell v. Roberts*, 11 Ired. 424, the court said: "If a sheriff or other officer have an execution of *feri facias* in his hands, payment to him discharges the execution. So, if he levy upon and sell property and receive the money; and the result will be the same even if he does not receive the money, because, by the sale, he becomes liable for it to the plaintiff in the execution, and the defendant is discharged by the seizure and sale of his goods. The execution thus becoming *functus officio*, the judgment upon which it was issued must be deemed satisfied, otherwise, the officer might, upon another execution for a trifling sum, ruin any person, since he might raise the money over and over again by sale after sale." In another case, where property not belonging to the defendant in the execution was levied on and sold by the officer by the direction of the plaintiff in the execution, who bid it off at a price sufficient to pay the debt, the law will immediately appropriate the money to the discharge of the execution and satisfaction of the judgment on which it is issued, and such discharge will not be affected by the fact that the claimant of the property sues for and recovers its value of the sheriff whom the purchaser had indemnified: *Halcombe v. Loudermilk*, 3 Jones L. 491.

McGhee v. Ellis et al., 4 Litt. 244, S. C., 14 Am. Dec. 124, furnishes an excellent illustration of what the rule is in Kentucky. In this case, the question was presented, whether a creditor or plaintiff in an execution is bound to refund to the purchaser the price of property sold under execution when the title proves defective; or in other words, is a creditor who barely pursues his legal remedy, without controlling in any way the acts of the sheriff, bound by an implied warranty to make good the title of goods or chattels sold under the execution. The court, in treating of the question, said: "It would be hazarding too much to say that all goods sold under execution passed with-

out any warranty of title, and that, in every instance, the purchaser runs the risk of title, and can have no redress for the loss of his money. On the contrary, we have no doubt that there is a responsibility somewhere to which he may resort, in case his title proves defective. If such liability exists, it must either be against the creditor, as the court below has decided in this case, or against the debtor whose debt is discharged by the sale, or against the sheriff who seized and made the sale. . . . The sheriff, with the judicial process in hand, seeks the estate of the debtor, and perhaps acting honestly and innocently, takes by mistake the estate of another and exposes it to sale. By this act and the return of the officer the debt is discharged, and the creditor is estopped by the return from again resorting to the judgment. The responsibility of the sheriff is very great. He is bound to execute a *feri facias* correctly, and at his peril must know that the property seized belongs to the debtor. Why, then, may not the acts of a sheriff who vends property which he represents to the world he has correctly seized and sold, be deemed equally sufficient to raise an implied warranty of title? The creditor is more remote from liability, in reason, than either the debtor or sheriff. Compelled by the refusal of the debtor to do him justice, he barely resorts to the means of coercion which the law furnishes him. Embarrassed and imbecile would be the remedy if he is construed to warrant all the estate of the debtor which the officer of the law shall seize and sell. The return of the execution satisfied, extinguishes and bars the judgment. In this case, he must be without further remedy. His judgment is discharged at law." See also the following cases: *Small v. Carr*, 1 Litt. 17; *Jones v. Henry*, 3 Id. 428; *Fawcett v. Pendleton*, 5 Id. 136; *Bank v. Shain*, Litt. Sel. Cas. 451; *Price v. Boyd*, 1 Dana, 436; *Rowe v. Williams*, 7 B. Mon. 206; *Ellis v. Kelly*, 8 Bush, 621; *West v. Kerby*, 4 J. J. Marsh. 56.

In Indiana, the rule of *caveat emptor* is generally applied with strictness to purchasers at sales under execution, but relief is sometimes afforded, as will be perceived by examining the following cases. In *Muir v. Craig*, 3 Blackf. 293, S. C., 25 Am. Dec. 111, the question presented for determination was, whether the purchaser at a sheriff's sale of land to which the execution debtor had no title, but which belonged at the time to the United States, can recover from the debtor in equity the amount of the purchase-money paid to the sheriff, though no fraud in relation to the sale be imputed to the debtor. The court held that the purchaser could recover from the debtor in equity the amount of the purchase-money paid to the sheriff. The court cited, in favor of its so ruling, the case of *McGhee v. Ellis*, noticed in the preceding paragraph. In the case of *Dunn v. Franier*, 8 Blackf. 432, the cases of *Muir v. Craig* and *McGhee v. Ellis*, were criticised, and the court said that in examining the latter case it will be found that there is a difference existing which should not be lost sight of. In all such cases, a distinction is made between the positions of the creditor and debtor, and it was held that the former would not be liable to refund, but that the debtor would when there was a total failure of title, because the debt being paid by the money of the purchaser, the latter would in equity be entitled to be substituted in the place of the execution creditor, so far at least as to enable him to maintain a valid demand against the debtor: *Preston v. Harrison*, 9 Ind. 1. But in some cases there was a tendency to relax the rule; as, for example, *Mace v. Dutton*, 2 Id. 309; S. C., 52 Am. Dec. 510. There, the court held that an execution merely voidable may be set aside on motion, but all acts done under it are valid: *Soule v. Champion*, 16 Ind. 167; *Ewing v. Hatfield*, 17 Id. 514; *Culbertson v. Milhollen*, 22 Id. 364; *Law v. Smith*, 4 Id. 58; *Applegate v. Mason*, 13 Id. 79;

Barrett v. Thompson, 5 Ind. 458; *Lindley v. Kelley*, 42 Id. 307; *Miller v. Ashton*, 7 Blackf. 29.

Ritter v. Henshaw, 7 Iowa, 97, was a case which came up on a motion by the plaintiff in execution, to set aside a levy and sale of real estate by the sheriff. It was shown to the court that the plaintiff obtained judgment against the defendant, and also for the establishment of a mechanic's lien on certain real estate. The lot was sold under a special execution and purchased by the plaintiff. The defendant, prior to the existence of the plaintiff's cause of action, had executed a mortgage on the lot, which had been duly recorded, and which was foreclosed by notice and sheriff's sale before the sale under the plaintiff's execution. The court held that the record showed a satisfaction, that being produced by the sale itself. "The doctrine of *caveat emptor* has its legitimate force in precluding any idea of a warranty by the defendant in execution or by the sheriff; but the creditor, or purchaser, should seek his appropriate relief under the statute." The case was remanded, with instructions to set aside the levy and sale, and the court was ordered to issue a general execution. Other cases of similar import decided in the same state are those of *Reed v. Crosthwait*, 6 Iowa, 219, and *Holtzinger v. Edwards*, 51 Id. 383.

The case of *Tudor v. Taylor*, 26 Vt. 444, affords an illustration of the rule in Vermont. This was a petition brought to vacate a levy of an execution on land to which the debtor had no title or interest. The judgment of the lower court was rendered in 1823, and an execution was issued and levied upon land in possession of Horace Hunter, and actually the property of Jabez Hunter. Possession was never taken by the creditors under the levy, and it was subsequently held and retained by Hunter, and those claiming under him. The officer's return of the levy showed an apparent satisfaction of record. The court held that when an execution is levied on real estate, to which the debtor has no title, and the records of the court furnish evidence on their face that the execution was satisfied by such levy, no proceedings can be had to obtain actual payment of that debt, until the evidence of that apparent satisfaction is removed. An application could be made to the court to vacate the levy, in order to correct its own records. But where an application is made to vacate a levy thirty years after the date of the levy, it ought not to be granted, inasmuch as the law will raise a presumption of payment and satisfaction of the judgment: *Pratt v. Jones*, 22 Vt. 341; *Baxter v. Tucker*, 1 D. Chip. 353; *Hubbard v. Dewey*, 2 Aik. 312; *Downer v. Hazen*, 10 Vt. 418; *Hall v. Hall*, 5 Id. 304; *Dimick v. Brooks*, 21 Id. 578.

It was decided in Illinois, in *England v. Clark*, 4 Scam. 486, that the general rule of *caveat emptor* applies to the sale of lands, to all judicial sales when made by the proper officers; and the rule not only discharges the officers or others who may make the sale, but equally protects from an implied warranty the plaintiff and defendant in execution. The rule is founded on public policy. The only recourse which the injured party has in such an action is an action of *assumpsit*, either against the defendant in execution or the officer. In speaking about vacating the satisfaction of the execution, the court said, litigation should have an end as soon as the object of its institution is accomplished. Admitting that by bill in chancery, or by application to the court, he can set aside the former execution, and obtain a new one against his debtor, would it not be positive injustice to drive him to this expense, force him to refund money which he had probably parted with, and incur the risk of the continued solvency of his debtor when no fault can be imputed to him? *United States v. Duncan*, 12 Ill. 523; *Nelson v. Cook*, 17 Id.

443; *Phillips v. Coffee*, 17 Id. 157. The same rule prevails in Missouri: *Maguire v. Marks*, 28 Mo. 193.

Swagerty v. Smith, 1 Heisk. 403, furnishes an illustration of the rule in Tennessee. The plaintiff recovered against the defendant a judgment, upon which an execution was issued. The land levied upon was duly sold, and purchased by the plaintiff's agent, who credited upon the judgment the amount realized, which was a satisfaction in part only of the judgment. Plaintiff afterwards caused a *scire facias* to issue, to vacate satisfaction of the judgment, alleging that the lands so levied upon and purchased "were held by prior and superior levies and liens of attachments and executions, and that he, plaintiff, takes nothing by his said purchases," etc. The code, section 2990, provides, that in all cases where execution from a court of record or justice of the peace is returned satisfied, in whole or in part, by the sale of property, real or personal, taken as the property of the defendant, and afterwards the property, or its value, or any part of it, is recovered by some third person, by suit against the plaintiff, or the officer making the levy or sale, the plaintiff may have the satisfaction set aside, and the judgment or decree revived on *scire facias*. It will thus be seen that the plaintiff had his remedy, but in his application for a *scire facias* he should have alleged that the land in question had been recovered from him by the defendant in execution or by any third party: *Edde v. Cowan*, 1 Sneed, 291; *Bumpas v. Gregory*, 8 Yerg. 45; *Smith v. Hinson*, 4 Heisk. 256; *Henry v. Keys*, 5 Sneed, 489.

In New York, it was held that the purchaser at an execution sale was entitled to relief when the title to the property purchased by him failed. In the case of *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528, S. Ct., 49 Am. Dec. 189, it was held that where a plaintiff in a judgment is himself the purchaser, and has been evicted for want of title in the judgment debtor, his remedy still depends upon the equitable principle of the colonial law, derived originally from the statute of Henry VIII., as applied to sales of land upon execution, which equitable principle has been applied by analogy to sales of personal property where the plaintiff became the purchaser, and was subsequently deprived of the benefit of his purchase for want of title in the judgment debtor; and the court also stated that when the common law did not provide for such cases they were proper subjects for the interference of the court of chancery; or for relief upon a summary application to the equitable power of the court out of which the execution issued. See also the cases collected in the note to the same case, 49 Am. Dec. 233; *Lansing v. Quackenbush*, 5 Cow. 38; *Adams v. Smith*, 5 Id. 280; *Barker v. Binniger*, 14 N. Y. 278; *Kingston Bank v. Eltinge*, 40 Id. 401; *Richardson v. McDougall*, 19 Wend. 80; *McChain v. Duffy*, 2 Duer, 645; *People v. Doper*, 1 Denio, 574.

In California, the code of civil procedure, sec. 708, provides, that "if the purchaser of property at sheriff's sale, or his successor in interest, fail to recover possession in consequence of irregularities in the proceedings concerning the sale, or because the property sold was not subject to execution or sale, the court having jurisdiction thereof must, after notice, and on motion of such party in interest, revive the original judgment." *Cross v. Lane*, 47 Cal. 602, was a case wherein the title to the property disposed of at the sale was not vested in the defendant in execution; the court held that the sale amounted to a sale of property not subject to execution within the intent of the act, and was consequently void: *Scherr v. Himmelman*, 53 Id. 312.

McCASKILL v. ELLIOTT.

[5 STROBART'S LAW, 196.]

OWNER OF DOG OF FEROCIOUS AND MISCHIEVOUS NATURE keeps the same at his own risk, and is, without regard to care or negligence, an insurer against all the harm that he might reasonably expect to ensue therefrom. WHATEVER IS CALCULATED TO ESTABLISH DANGEROUS PROPENSITY OF ANIMAL, in a sufficient degree, tends to support the allegation in a count that the owner has actual knowledge of the same, is conformable to precedent, and is sufficient after verdict.

CASE. Defendant was the owner of a large dog, noted for his mischievous habits and fierceness of disposition. He stated that he was aware of the same, and cautioned parties relative to approaching his property whenever the dog was near. One day his son started to attend service at the church, and he was followed by the dog. After arriving at the church, he dismounted from his horse, removed the saddle, and secured the animal. The dog lay down near where the horse was fastened, and the plaintiff, Kenneth McCaskill, coming soon afterwards, hitched his horse, and walking towards the church, passed near the dog. The dog flew at him and bit him. Hence the action. The jury returned a verdict in favor of the plaintiff for a sum sufficient to carry the costs. Defendant appealed.

Kershaw, for the plaintiff.

Smart, for the defendant.

By Court, WARDLAW, J. In every case for mischief done by an animal, where no evil design is imputed to the defendant, the cause of action is the defendant's breach of social duty in not effectually preventing a thing within his control from doing the harm complained of, when his previous information ought to have shown that the thing was likely to do such harm if not prevented. If the plaintiff's only statement of the evil qualities of the dog known to the defendant had been that in the first count—that it was accustomed to bite mankind—then the particularity of the averment would have required evidence of at least one biting of a human creature. But under the second count alleging a ferocious and mischievous disposition, whatever was calculated to establish the dangerous propensity of the animal in sufficient degree tended to support the allegation, and was properly left to the jury. That a dog has once bitten a man is a circumstance from which the probability of its biting another may be inferred; but the

same inference may be drawn with equal confidence from other indications of the dog's disposition. Indeed, attempts before made by a dog that had never succeeded in actually biting, may give more full assurance of danger to be apprehended from it than could exist as to another dog that, under some peculiar circumstances, had used its teeth upon man. To require that a plaintiff, before he can have redress for being bitten, should show that some other sufferer had previously endured harm from the same dog, would be always to leave the first wrong unredressed, and to lose sight of the thing to be proved, in attention to one of the means of proof. If nothing short of a dog once having bitten can show its dangerous nature, even the owner of a dog known to have been bitten by a rabid animal may not be answerable, unless on some previous occasion the dog has inflicted the dreadful injury, which he was bound to have apprehended and prevented.

But if the evidence sustained the second count, the defendant says that count is insufficient. He has not demurred to it, but insists that there being one count good on its face, which is not sustained by evidence, a new trial should be granted, when the only count proved is such a one as, standing alone, would have been bad on general demurrer. The defect alleged is the want of any special averment of negligence—the count being in substance that the defendant wrongfully and injuriously kept a dog which he knew to be of ferocious and mischievous disposition, and which bit the plaintiff. The argument is this: He who keeps a dog that he knows is accustomed to bite mankind, does so at his peril—for he ought to kill it; the keeping is the wrong, and when to that damage done to the plaintiff is added, an action lies without averment or proof of negligence, and notwithstanding any care taken by the defendant; but a ferocious and mischievous disposition is uncertain, admitting of various degrees—it cannot be said to be necessarily wrong to keep a dog of such a disposition, and therefore negligence in the keeping, under the circumstances, is a necessary ingredient in an action for damage done by such a dog. The answer is, that what is said of a dog accustomed to bite mankind is (except the duty of killing assigned as a reason) true as to any animal, wild or tame, from which the defendant ought, according to his previous knowledge, to have expected the mischief complained of—every such animal the owner keeps at his risk, being, without regard to care or negligence, an insurer against all the harm that he might reasonably have expected to ensue.

No strength of bars nor extraordinary accident can be urged as an excuse for the mischief of a tiger or monkey; but still, from damage suffered from either, a plaintiff might deprive himself of a right to complain, if, in disregard of warnings given to him, and without the knowledge of the keeper, he should remove sufficient barriers, and expose himself to be torn.

If the owner of a dog knew, from sufficient indications, that it was likely, at all times and in all places, to bite strangers that approached it, no care in closing gates, nor chain broken, is an answer to a plaintiff who has been bitten, when it escaped. If it was only so ferocious as to bite those who hurt it, a plaintiff (whose own misconduct has not brought just punishment upon himself) may well complain that it was not prevented from lying where he incautiously trod upon its toes. But still a watch-dog may be kept, and if it is safely confined, so that only wrong-doers may suffer from it, it is the more valuable if it is sure to punish their unlawful ingress, and a person whose trespass has encountered it must endure the consequences.

If a dog is likely, as his owner knows, to bite either man or sheep only at particular seasons, or under particular circumstances, then, against those seasons and circumstances, and that kind of mischief to be apprehended in them, the owner insures at his peril. A plaintiff who has suffered such mischief is, in cases that have been decided, advised to allege a general mischievous disposition, rather than a particular habit. Under such general allegation, his count is in effect that the defendant wrongfully kept a dog which he knew was likely to do a certain harm, and that the dog had done that harm to the plaintiff. From such harm done by such dog, the inference of blamable negligence contained in the fact of keeping necessarily arises, and, therefore, in this count negligence is substantially averred. A count of this kind puts in issue the existence of a disposition in the dog, ferocious and mischievous to such a degree as was likely to produce the injury complained of—such knowledge of that disposition, on the part of the defendant, as ought to have induced his reasonable apprehension and effectual prevention of such an injury—the subsequent keeping of the dog—and the injury consequent thereon. Care taken by the defendant, which has failed to prevent what thus he ought to have apprehended and prevented, whilst he kept the animal, could not be a defense in any action of this kind; however plainly sufficient, it would be for the defendant

to deny, and by evidence contradict, all previous indication or habit known to him that could have reasonably induced his expectation, that, under the circumstances that occurred, the harm complained of would have been done.

The count now objected to is conformable to various precedents, and is certainly sufficient after verdict.

In the case before us, the attention of the jury was directed to the question of negligence, perhaps unnecessarily; but negligence has been in fact expressly found. The dog may have been harmless in the defendant's yard, but he knew that it had a habit of following and guarding a horse, and that when thus employed it was dangerous. He was bound then to insure against this habit, and when he suffered the dog to mount guard at a meeting-house, where many persons unsuspecting of danger may have been expected to pass, he surely was blamably negligent.

The motion is dismissed.

EVANS, FROST, and WITHERS, JJ., concurred.

Motion refused.

LIABILITY OF OWNER FOR INJURIES DONE BY ANIMALS.—The owner of a dangerous dog is liable for injury done by him after notice of one instance of similar misbehavior on the part of such animal: *Kittridge v. Elliott*, 41 Am. Dec. 717; *Loomis v. Terry*, 31 Id. 306; *Hinckley v. Emerson*, 15 Id. 383, and notes.

FARRAR v. WINGATE'S ADMINISTRATORS.

[4 RICHARDSON'S LAW, 25.]

SHERIFF IS BOUND TO EXECUTE WRIT OF FIERI FACIAS within a reasonable time, and in default he is liable for any damage which plaintiffs sustain by reason of his negligence or refusal.

INDORSEMENT ON FIERI FACIAS, "STAY OF SALE ONLY," applies only to the sale, and a failure on the part of the sheriff to make a levy will render him liable for neglect.

"STAY OF SALE" WILL SOMETIMES IMPLY STAY OF LEVY; but when the sheriff is specially instructed to proceed and levy immediately, he should obey the instruction, and his omission to do so within a reasonable time is a neglect of duty.

EXECUTION OF FIERI FACIAS CONSISTS PROPERLY OF TWO ACTS: levy, or taking the goods into the hands of the sheriff for sale; and the sale itself. Either or both of these acts are within the control of the plaintiffs in execution.

ACTION against the administrators of the estate of William Wingate for negligence in not levying an execution of the plaintiffs while deceased had been acting as sheriff. **Farrar**

and Hays, the plaintiffs, obtained a judgment by confession against William King for nine hundred and ninety-six dollars and sixty cents. The judgment was entered, and a writ of *fi. facias* issued and placed in the hands of Wingate. The writ was indorsed as follows: "Sales only under this execution postponed till the twenty-sixth of October, 1842." Wingate called upon plaintiffs' attorney for information relative to the indorsement, and was informed that it was simply intended as a stay of sale, and the attorney instructed Wingate to levy immediately. This he failed to do, although frequently requested to do so. He declined doing so several times, assigning as a reason that there was no danger. About sixteen days after the writ had been put into Wingate's hands, he instructed one of his deputies to make a levy, which was done, and a sale followed, leaving a balance of one hundred and fifty-eight dollars after satisfying an older execution and the costs of plaintiffs' writ, to be applied to the plaintiffs' debt. Upon the trial of the cause, the jury found for the plaintiffs one hundred and fifty dollars, exclusive of what they were entitled to, in the sheriff's hands. Both parties appealed, but the plaintiffs finally abandoned their appeal, and the defendants' appeal was alone considered.

F. J. Moses, for the plaintiffs.

J. A. Dargan, for the defendants.

By Court, O'NEALL, J. In this case, the plaintiffs' attorney abandoned their grounds of appeal, so that the defendants' objections to the verdict alone remain to be considered. They, although several, present only one question—whether the sheriff, when specially instructed to levy, was justified in not levying, on account of the sale being stayed by the plaintiffs.

Our anomalous condition, under the rule that the lien of a *fi. fa.* is from its lodgment, prevents us from having the aid of authority on this and many other questions arising under the sheriff's execution of *fi. fas.*

I have no doubt that, in general, the execution of a *fi. fa.* consists properly of two acts: levy, or taking the goods into the hands of the sheriff for sale; and the sale itself. That the plaintiff in execution can control either or both of these is, I think, perfectly clear. Were it not so, he might, by stipulating to indulge his debtor, in the ultimate enforcement of his right of satisfaction by sale, be deprived of the property on which his *fi. fa.* had a lien. For while the sale was stayed (if such a stay prevented a levy), his debtor might send his per-

sonal property into another state, and thus defeat the lien and the possibility of satisfaction by sale when the stay expired.

The whole objection urged is on account of the inconvenience arising from the sheriff being obliged to keep the property for the interval between the levy and the expiration of the stay of sale. But this is one of the incidental troubles connected with the correct administration of the sheriff's office.

I think, however, the sheriff can make no such objection as that now presented. The plaintiff in execution has the right to control, absolutely, so far as the sheriff is concerned, the *fi. fa.* The memorandum, "Sales only under this execution postponed till the twenty-sixth of October, 1842," was the sheriff's law, by which he was to be governed until the plaintiff gave him some other. He had no right to go back to the confession, and justify himself by a different stay there agreed upon. That was for the debtor to enforce or not, as he pleased; the sheriff had nothing to do with it. So, when the sheriff was ordered to levy, he had no right to say, "That is contrary to your previous instruction indorsed on the execution, to stay sales." The plaintiffs had the right to proceed at their peril; the debtor, if it was contrary to their agreement, might on a proper case made arrest their proceeding, by an order made by any of the judges. But the sheriff's duty is to execute the *fi. fa.* according to its mandate, or according to the plaintiff's instructions.

The motion is dismissed.

EVANS and WITHERS, JJ., concurred.

WARDLAW and FROST, JJ., dissented.

Motion refused.

SHERIFF'S LIABILITY FOR NEGLECT TO LEVY PROPERLY, or advertise, or sell on execution: See *Sexton v. Nevers*, 32 Am. Dec. 225; *Gosner v. Van Meter*, 33 Id. 221. In the case of *Dunlop v. Berry*, 39 Id. 413, it was held that the sheriff must make reasonable exertions to levy upon the property of the execution defendant, and if by reason of his neglect any property escape levy, and loss is thereby incurred by the execution plaintiff, he will be responsible to the latter therefor.

KINSLER v. McCANTS.

[4 RICHARDSON'S LAW, 46.]

PARTNERS BY CONTRACT OF PARTNERSHIP ACQUIRE JOINT INTEREST IN EFFECTS of the partnership, and are constituted mutual agents for all purposes within the scope and objects of the partnership.

AFTER DISSOLUTION INTER VIVOS, JOINT INTEREST OF PARTNERS CONTINUES in the partnership property, and the mutual agency continues, with some restrictions, until the affairs of the partnership are administered.

PARTNERSHIP IS NOT COMPLETELY DISSOLVED UNTIL ITS AFFAIRS ARE CLOSED.

POSSESSION OF ANY PART OF ASSETS BY EITHER PARTNER does not sever the joint property, nor vest a separate interest in him.

PARTNERSHIP DISSOLVED BY DEATH OF ONE OF PARTNERS, or being otherwise dissolved, one of the partners afterwards dies, the legal title to all the choses in action which belonged to the partnership becomes vested in the survivor, and the settlement of the partnership devolves on him.

REPRESENTATIVE OF DECEASED PARTNER HAS NO LEGAL INTEREST or title in the choses in action which may have been in the possession of the deceased partner at the time of his death, and is liable to an action by the surviving partner for the recovery of them.

WORDS "SURVIVOR OF," ETC., ASSUMED BY PLAINTIFF in his pleading, may be treated as a *descriptio personæ*, or rejected as surplusage.

ACTION brought to recover from defendant the amount of a note, less commissions, which he had collected in his capacity as attorney. John J. Kinsler, surviving partner of the firm of Kinsler & Jordan, upon dissolution of the firm, left sundry notes of the firm in the hands of Jordan for collection. Jordan placed some of these notes in the hands of James B. McCants for collection. McCants brought suit for one of these notes in the name of the firm, and after obtaining judgment, Jordan died. McCants afterwards received the money on the judgment, and paid it over to the administrator of Jordan's estate, notwithstanding the fact that Kinsler previously claimed it as the surviving member of the firm. Suit was brought by Kinsler, under the title of "John J. Kinsler, survivor of Kinsler & Jordan, v. James B. McCants," in accordance with the above, and the court held that the firm was not in existence when Jordan entered into the contract with McCants, and the latter was justified in paying the money to Jordan's representative. Plaintiff moved for a nonsuit, with leave to move to set the same aside.

Hammond and Buchanan, for the plaintiff.

Rutland, for the defendant.

By Court, FROST, J. It is elementary law that by the contract of partnership, the partners acquire a joint interest in the effects of the partnership, and are constituted mutual agents for all purposes within the scope and objects of the partnership. After a dissolution, *inter vivos*, the joint interest of the partners continues in the partnership property; and the mutual agency

's prolonged, with some qualifications not material to this case, until the affairs of the partnership are administered. A partnership is not completely dissolved until its affairs are closed. The possession of any part of the assets, by either partner, does not sever the joint property, nor vest a separate estate in him. If the partnership is dissolved by the death of one of the partners, or being otherwise dissolved, one of the partners afterwards dies, the legal title to all the choses in action, which belonged to the partnership, becomes vested in the survivor or survivors. If there be only one survivor, the settlement of the partnership is devolved on him. He must sue in his own name for the recovery of debts due to the partnership; and he only can be sued by the creditors of the partnership. The representative of a deceased partner has no legal interest or title in the choses in action which may have been in the possession of the deceased partner at the time of his death, and is liable to an action by the surviving partner for the recovery of them.

Consistently with these general principles, it cannot be disputed that if Williamson's note had remained in the possession of Jordan, uncollected, at the time of his death, Kinsler might, in an action of trover, have recovered it against Jordan's administrator. The debts of the partnership were unpaid. Jordan held Williamson's note under no assignment or transfer of his interest from Kinsler; but on the deposit by Kinsler of that and other notes, due to the partnership, and to Kinsler individually for collection. The legal right of Kinsler to Williamson's note was admitted by the administrator of Jordan, when he delivered to Kinsler the other partnership notes. They had all been deposited with Jordan by Kinsler, at the same time, and for the same purpose. There is no evidence, nor allegation even, that Jordan had any claim or interest in Williamson's note which he had not in the rest. From this implied admission of Kinsler's right to Williamson's note proceeds the necessary concession, by Jordan's administrator, that the amount collected by the defendant was wrongfully paid to him.

What defense can the defendant make to the plaintiff's right to recover from him the amount tortiously paid to Jordan's administrator?

The payment was not made without notice of the plaintiff's claim. The defendant knew that Jordan had been the partner of Kinsler, and that Jordan was dead. He knew that Williamson's note was partnership property, for it was payable to Kinsler & Jordan, and was collected under a judgment and

execution, recovered in the copartnership name. The defendant, according to the report, had no evidence whatever of the severance of the joint interest by any transfer or assignment by Kinsler to Jordan. Jordan's possession of the note warranted no presumption that it was his individual property, for that was entirely consistent with the fact that it was partnership property. The defendant cannot plead, if he would admit, ignorance of the law that, by the death of Jordan, the legal interest in Williamson's note became vested in Kinsler. Besides all this, the defendant had actual notice of Kinsler's claim to the amount recovered, and yet willfully paid it to Jordan's administrator.

The defendant cannot plead that Jordan, as partner, had an agency, coupled with an interest, which might transmit the note to his administrator. Jordan's agency was determined by his death, and his joint interest became vested in Kinsler. When a deposit is made by a party, in a special character, as guardian, executor, or trustee, then, if the trust has terminated, as if the guardianship had ceased, or the executor renounced, and a new administrator appointed, the delivery should be to the party entitled to the right of property. If the infant has come of age, the delivery should be to him; or in case of the new administrator, the delivery should be to him: Story on Bail. 83. In an action by the surviving partner, the defendant can no more plead a bailment by the deceased partner than in an action by the executor can the defendant plead a bailment by the testator.

The defendant cannot object that, being the bailee or agent of Jordan, the action cannot be maintained against him, but should have been brought against the administrator of the bailor. However it may have been formerly held, the right of the owner, in all cases, to recover his property against a person having no title, whether a bailee or not, is now established: Story on Bail. 79; *Wilson v. Anderton*, 1 Barn. & Adol. 450. If the principal is a wrong-doer, the agent, however innocent in intention, who participates in the act, is a wrong-doer also: Story on Agency, sec. 397; *Perkins v. Smith*, 1 Wils. 328; *Adamson v. Jarvis*, 4 Bing. 66. Jordan was a wrong-doer if he deposited Williamson's note with the defendant, to be collected on his individual account.

If it be objected that no cause of action accrued to Kinsler & Jordan against the defendant, with respect to the amount of Williamson's note, because it was collected after Jordan's death, and so the action should have been brought by Kinsler in his

own name, Kinsler's styling himself "survivor of Kinsler & Jordan" may be treated as a *descriptio personæ*, or rejected as surplusage.

The motion is granted.

O'NEALL, EVANS, and WARDLAW, JJ., concurred.

Motion granted.

POWER OF ADJUSTING UNSETTLED AFFAIRS OF PARTNERSHIP survives the dissolution as a necessary power; yet with this qualification, and subject to this exception, those who were formerly partners stand to each other, after the dissolution, as if the association had never been formed: *Ellicott v. Nichols*, 48 Am. Dec. 546. Dissolved partnership continues in force, in legal contemplation, for the purpose of winding up its affairs, until a full settlement has been had and all outstanding liabilities have been met: *Brown v. Higginbotham*, 27 Id. 618; *Houser v. Irvine*, 38 Id. 768; *Ferreira v. Sayres*, 40 Id. 496.

LEGAL TITLE TO CHOSSES IN ACTION of a partnership vests in the survivors on the dissolution of the firm by death of one of the partners: *Egberts v. Woods*, 24 Am. Dec. 236, and note to *Chardon v. Oliphant*, 6 Id. 574.

McCULLOUGH v. WALL.

[4 RICHARDSON'S LAW, 68.]

PRESUMPTION OF TITLE ARISING FROM POSSESSION.—Where one claims and holds lands through an executor, and such lands are co-extensive with the grant to the deceased, the authority of the executor to convey will be presumed without the production of the will.

DEED TO THOMAS JEFFERSON, PRESIDENT OF THE UNITED STATES, and his successors in office, vests the title in him as trustee, and a future conveyance by the United States will raise a presumption of a conveyance from the president to the government.

PATENT FOR LAND WITHOUT WITNESSES, BUT SIGNED AND SEALED BY SECRETARY OF WAR, is sufficient to convey lands from the United States to a state, if the state recognizes the conveyance as valid.

PLAT REFERRED TO AS BEING ANNEXED TO DEED, though separated, may be given in evidence when shown to be the one referred to.

ONLY PARTIES TO DEED CAN QUESTION ITS INTENT OR VALIDITY.

POSSESSION FOR MONTH OR TWO EVERY SPRING is not such continuous possession as to give title under the statute of limitations.

PRESUMPTION OF GRANT WILL NOT ARISE FROM PERMISSIVE USE ACCOMPANIED BY PAYMENT OF RENT.

LAND BOUNDED BY NAVIGABLE RIVER extends to the middle of the stream, unless the conveyance denotes an intention to stop short of that.

PAROL DECLARATION OF INTENTION CANNOT VARY DESCRIPTION IN DEED so as to extend the land to low-water mark instead of to the middle of the stream.

ISLAND LYING ON ONE SIDE OF STREAM belongs to the owner of the bank on that side.

ISLAND LYING IN MIDDLE OF RIVER, so that the original middle line passes through it, belongs to the owners of the land on the two banks, according to the original dividing line.

THREAD OF STREAM IS ASCERTAINED BY MEASUREMENT across, without regard to the depth of the water.

RIPARIAN PROPRIETOR'S OWNERSHIP OF LAND UNDER WATER of an un-navigable stream is measured by lines at right angles to the bank, without regard to the course of the lines bounding the remainder of his tract.

LAND COVERED BY WATERS OF RIVER, ABOVE FALLS OBSTRUCTING NAVIGATION, is subject to public easements; as the right to improve the river, the right of fishing, and the right to its use as a public highway.

NAVIGABLE RIVER IS ONE IN WHICH TIDE EBBS AND FLOWS.

TRESPASS to try title. The plaintiff sought to recover a certain rock called Julius's rock, situated in the Catawba river, and usually covered with water. It was used by the defendant as a fishing station. Plaintiff claimed the rock as a part of the Mount Dearborn tract, of which he was in possession. The tract lay on the west side of the river, mainly above the rock. He adduced in support of his title: 1. A grant of land to William Moore, dated July 7, 1772, described as being bounded by the Catawba river at the great falls—the whole river without the island being laid down in the plat as the eastern boundary; 2. A deed of the same land from Isham Moore, professing to convey as executor of William Moore, under power conferred by his will to Thomas Sumter, November 12, 1802. A plat annexed represented the river as the boundary; 3. A deed of the same land from Thomas Sumter to Thomas Jefferson, president of the United States, to him, his successors in office and assigns. This land is described as being "bounded north-east by the Catawba river;" 4. A patent under the seal of the war department of the United States, conveying the same land to the state of South Carolina, May 6, 1844; 5. A deed of land next the river of the Mount Dearborn tract from the superintendent of public works of South Carolina to plaintiff, November, 1844. When this deed was produced, the plat admitted to be the same that the deed referred to as being attached to it was separate from it, although manifestly it had been attached by wafers. Defendant moved for a nonsuit, which was denied. He also moved for a new trial.

Gregg and McAlilly, for the plaintiff.

Eaves and Thomson, for the defendant.

By Court, **WARDLAW, J.** The various grounds taken by the defendant for a nonsuit or new trial have been considered by

this court in connection with the parts of the report which relate to them severally, and for the opinion of this court, the observations made in the report will be adopted, wherever they are approved and seem to require no addition.

The testimony of the surveyors furnishes an answer to the first ground for nonsuit.

The second, third, and fourth grounds for nonsuit are answered by the evidence of possession by the United States, and the presumptions thence arising. The claim and possession were, according to the description of the deed from General Sumter to Mr. Jefferson, co-extensive with the grant to William Moore; and the presumptions establish the authority of Isham Moore to convey, and a conveyance from Mr. Jefferson to the United States; in effect, a title in the United States to the land as it was originally granted.

The sixth ground for nonsuit is sufficiently answered by the report; and to the observations there made in relation to the fifth, little need be here added. Two witnesses are ordinarily requisite to a conveyance of land in South Carolina: *Craig v. Pinson*, Cheves L. 272. But the act of 1795, 5 Stat. 526, by the form it prescribes and the words, "from one person to another or others," used in its first section, shows that it contemplated only conveyances between natural persons, and must be construed so as to reconcile it with other law which regulates the mode by which acts of state shall be authenticated. Under the authority given by South Carolina to the United States, 5 Stat. 260, to purchase "the fee-simple of any quantity of land, not exceeding two thousand acres, for the purpose of erecting arsenals and magazines thereon," the *jus disponendi* passed with the fee-simple to the United States, to be exercised whenever the purpose of the purchase had been abandoned or accomplished. It could be exercised only, as a government performs all acts, by some regularly constituted authority. The acts of 1843, 11 Stat. 253, 272, and resolution 109, subsequent to the act of congress, 1829, 4 Laws of United States, 2170, which authorized the secretary of war to convey the land to the state of South Carolina, recognized the sufficiency of the conveyance proposed to be made; and the conveyance of the secretary of war was the act of the head of a department having a seal, and was properly authenticated by that seal. and not by the attestation of witnesses: 1 Greenl. Ev., sec. 479.

Of the grounds for new trial, the eighth is sufficiently an-

swered in the report. As to the second, third, and fourth, it is clear that the words used in the deed from the superintendent of public works to the plaintiff cannot derive any meaning, different from the ordinary legal signification, from the acts or words of the parties; and that the words of the deed convey to the plaintiff whatever was then "the remainder of the Mount Dearborn tract:" 3 Kent's Com. 428. This description extended the boundary on the east to the original boundary of the tract as it was granted in 1772. Much has been said of the fraud, which it is supposed would be consummated by the plaintiff's now holding half of the river, after having, before his purchase, directed a survey to embrace only the land uncovered by water. It is easy to understand how the price of a whole may be fixed by ascertaining the value of a prescribed part; but if it be conceded that the plaintiff and the superintendent both declared their intention to make the low-water mark the boundary, the question is at last only whether any parol declarations shall avail to control the meaning of the writing, by which the intention of the parties was expressed. If a fraudulent contrivance, or mistaken use of words, has defeated the intention of the parties, they may have inquiries and adjudication between themselves; but, they acquiescing, the deed subsists, and the question which a third person may raise is not, Should the deed be rescinded? nor, Does it truly express the intention of the parties? but, What does it mean? The case of *Noble v. Cunningham*, McMull. Eq. 289, shows that corner trees marked on the river bank have not influence (where a river not technically navigable is the boundary) to stop short of the *filum aquæ* the rights of a purchaser, whose deed refers to a plat showing such corners.

The fifth, sixth, and seventh grounds for new trial present the points which have been most debated, and the questions under them will be considered without regard to the order which they indicate.

The possession of the defendant of the rock for a month or two every spring, was not such a continuous possession as could give to him a title under the statute of limitations: *Jackson v. Lewis*, Cheves L. 260.

No presumption of a grant to the defendant of either the rock, or of a right to fish at it, can arise from the use which he and those under whom he claims made of the rock; for the use was permissive, accompanied by such distinct acknowledgment of right in another as the payment of rent implies, and interrupted by change of claimants without transfer of title.

The rock in question is west of the main channel, which runs between it and Hill island, but it is doubtful whether, in a line perpendicular to the river-bank, the rock is nearer to the island or to the bank; it is, however, far west of the middle of the river, measuring from bank to bank across the island. The jury were instructed that, under these circumstances, the rock was west of the *medium filum aquæ*: and to that instruction objection is made. The evidence showed that the water west of the rock was shallow, and that in dry summers much of it disappeared; the low-water mark may have been, as Mr. Aiken thought it was, nearer to the rock than the island was, but there was contrariety of testimony on this point, which the instructions rendered it unnecessary for the jury to consider. We must then look to the propriety of the instructions. The situation of the main channel, whether east or west of the rock, is unimportant, for the ordinary low-water mark on each side having been fixed, the *medium filum aquæ* is ascertained by measurement across, without regard to the depth of the water. The question then is, whether the measurement to fix the boundary of plaintiff's rights should be from his bank to Hill island, or to the other bank of the river.

If the western margin of Hill island belonged to another person, the exact boundary between that person and the plaintiff would be midway between the island and the western bank of the river. But islands in rivers, like rocks (which are only small islands), fall under the same rules concerning ownership which apply to the soil covered by water. This proposition, which seems to have been established by a consideration of the instances of islands formed by alluvial deposits, embraces all islands, whether of recent formation or remote origin: 3 Kent's Com. 427; 2 Bla. Com. 261; *Ingraham v. Wilkinson*, 4 Pick. 269 [16 Am. Dec. 342]; Hargrave's Law Tracts, 5-36. If they have not been otherwise appropriated by some lawful means, they belong in severalty to the owners of land on each side of the stream, according to the line of division which would have existed if they had continued under water. An island lying on one side of the *filum aquæ* belongs to the owner of the bank on that side if no opposing right to it has been lawfully acquired by another person. If it is situated so near the middle of the river that the original *filum aquæ* passed through it, and no opposing right has been acquired, it belongs to the owners on the two banks, according to the original dividing line.

Upon the supposition of there being nothing in the character

of the river to forbid, the plaintiff's right, under the grant of 1772, extended *prima facie* to the middle of the river, or original dividing line; and to rebut the title shown by him, less evidence did not suffice as to the islands and soil covered by water which were included within his boundaries, than would have served as to his land on the western bank of the river. Now, there was no evidence that the portion of Hill island which lies west of the original *filum aquæ* belonged to any third person; no grant of it from the state appeared, nor any such possession as could give a title under the statute of limitations. A claim of one Robinson, said to be under a sale made at Lancaster, was spoken of, but no papers were adduced nor any evidence given which showed the validity of the claim to any portion of the island, much less to that portion which lies west of the middle of the river—that is the dividing line between the districts of Chester and Lancaster. Nothing then limited the plaintiff's rights to the *filum aquæ* between his bank and Hill island, and the instructions on this head were proper.

The jury have found that the Catawba river, where it is the boundary of the land granted, was not in 1772, the date of the grant, navigable for boats. If it has since been made navigable, the right of the public to use it as a highway has been asserted; but the right of the grantee and those claiming under him, subject to the rights which the public have in the river as a highway or easement, continues to the soil granted, *ad filum aquæ*, as it vested at the grant. A subsequent improvement of the river, or change of the law relating to the soil of rivers, could not divest the rights of soil which had been granted, further than was required for some public purpose.

The jury have also found that the river, where it is the boundary of the plaintiff's land, was not at the time of the alleged trespass navigable for boats—and this, too, upon the supposition that if a portion of it above and a portion below was so navigable, then the intermediate portion obstructed by falls must have the same legal character. It follows that even if all rivers navigable for boats are held *juris publici* for fishing, as well as for navigation, and if a right to fish includes a right to fasten a boat to a rock which rises above the water wherein the right exists, still the defendant is not justified in his trespass upon the plaintiff's soil by the right to fish at the rock in question.

It is, however, urged by the defendant that it was not for the jury to decide whether the river was navigable; that it is made

navigable by acts of the legislature, and must be deemed by the court to be so; and that therefore the soil of it is not the plaintiff's, and if it is, the defendant has the right of fishing in it which belongs in common to all citizens.

Various acts of the legislature, from the year 1753 to the year 1810 (7 Stat. 504, 532, 549, 562, 578; 9 Id. 212, 254; 5 Id. 94), show that repeated attempts were made to render this river navigable; and these acts, by their very words, contain an admission that originally the river was not easily navigated by boats above the rafts which were below Camden, and that in the last-mentioned year, it was not navigable by any species of craft above the foot of the great shoals below Rocky Mount. Subsequent legislation and the evidence taken in this case show, however, that between 1817 and 1830 large appropriations from the state treasury were made for the improvement of this river above Camden; canals were made around the Rocky Mount shoals and other shoals, and up to the North Carolina line the river was treated by the public authorities as being fit for navigation, and was for a short time actually used by boats; and that the public works therein are yet somewhat preserved, although disused. Since the year 1785 (5 Stat. —; 6 Id. 340), and perhaps before, there have been provisions made by law for keeping open fish-sluices on the river, and preventing obstructions to the passage of fish: *State v. Thompson*, 2 Strobb. L. 12 [47 Am. Dec. 588]. We will give to the public appropriations and to the instances of actual navigation the effect to show that the river was, at the time of the alleged trespass, navigable for boats, or "floatable" (to use a word which Chancellor Kent has taken from the French), and will even concede that the plaintiff is in no better situation than if his original grant bore even date with the deed from the superintendent to him; still we are of opinion that the soil at the rock was the plaintiff's, subject to servitudes for the public use, and that the defendant had not a right to fish there.

By the common law, only those rivers were deemed navigable in which the tide ebbs and flows; and "grants of land bounded on rivers, or upon the margins of the same, or along the same, above tide-water, carry the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river; and the public, in cases where the river is navigable for boats and rafts, have an easement therein, or

a right of passage as a public highway:" 3 Kent's Com. 427. "Where a stream is used in a grant as a boundary or monument, it is used as an entirety to the center of it, and to that extent the fee passes. *Prima facie*, said the vice-chancellor of England, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream:" Id. 428, citing *Wright v. Howard*, 1 Sim. & St. 190; *Deerfield v. Pliny Arms*, 17 Pick. 41 [28 Am. Dec. 276]. But these settled principles of the common law are said to have been changed in our state by adjudged cases, and reference is made to the case of *Cates v. Wadlington*, 1 McCord, 580 [10 Am. Dec. 699]. To the judgment in that case no one would impute error; in some of the observations which the opinion contains, sufficient attention seems not to have been given to the distinction between the proprietary interest which the state for the public use has in a public navigable river, and the easement so essential to public convenience which the public have in a river not navigable, yet fit to be used as a highway. The point really decided was, that a vendee cannot have an abatement for deficiency of quantity where the conveyance to him contains no warranty, and he is undisturbed in the enjoyment of whatever interest the vendor had in the whole land conveyed. Judge Nott, looking to the importance of preserving unobstructed the public right to use streams which might facilitate transportation, says that because of the greater length of our rivers than of the insular streams in England, the common-law rule, which regards no rivers as navigable but those in which the tide ebbs and flows, "will not do for us;" whilst he declines to define what shall be considered a navigable river in this state, he ventures to say that "that cannot be considered a navigable river the natural obstructions of which prevent the passage of boats of any description whatever." Such, we may observe here, was the Catawba above the falls at the date of the grant to William Moore, and for a long time afterwards; and such, in the entire disuse and dilapidation of the public works, it is now and has been for more than ten years past.

The occasion does not require any exact definition to be now given of a navigable river, according to the law of this state, in which the ownership of the soil shall not belong to the riparian proprietors; perhaps the principal occasion of dispute on the subject has been the use of the term "navigable," which has a popular signification different from the technical one which is given to it by the common law. We can, however,

safely say that no authoritative decision has yet been made in this state which has changed the common law on the subject. Arguments on both sides, drawn from considerations of policy and the law of other countries, have been addressed to us. On one side are commendations of the common-law rule, for its wisdom and careful protection of all rights involved, its adoption by many of our sister states which are traversed by large fresh-water rivers, its certainty, and the unquestionable authority on which it rests; on the other side are the examples of continental Europe, Pennsylvania, Alabama, and some others of these United States, the civil law, and inconveniences thought to result from subjecting to a rule which was formed for short and small streams, mighty rivers, upon which, as upon inland seas, ships that have crossed the ocean may be safely navigated far above the reach of the tide: *Adams v. Pease*, 2 Conn. 481; *Hooker v. Cummings*, 20 Johns. 99 [11 Am. Dec. 249]; *Ingram v. Threadgill*, 3 Dev. L. 61; *Walker v. Board of Public Works*, 16 Ohio, 540; Angell on Watercourses, 14, 19; Hilliard on Real Prop. 92, 94, 139; 3 Kent's Com. 428, 430, notes; *Carson v. Blazer*, 2 Binn. 475 [4 Am. Dec. 463]. The rivers of our own state are not of remarkable magnitude, and whether we adhere to the common-law definition or consider as navigable all rivers that may be navigated by sea vessels, or all that are by nature "floatable," we hesitate not to declare that this court, if it should feel itself at liberty, from considerations of public convenience, to assume legislative discretion in the matter, is not likely by any decision to extend the rules which, by the common law, are applicable to navigable rivers, to any stream above those falls which by nature obstructed the serviceable use of its water for transportation. Above those falls, as below, the right of the public to improve a river, and to use it as a highway, subsists; to that, the proprietary right in the soil is subject; but so subject, the proprietary right exists in the owners to whom it has been granted—above the falls, at any rate, as we may now safely say.

And so in regard to fishing in the rivers. "A right of fishing in navigable or tide-waters is a common right. In rivers and streams not navigable, as tide-waters, the owners of the soil over which they flow have at common law the exclusive right of fishing, each on his own soil, unless some other person can show a grant or prescription for a common of piscary, in derogation of the right naturally attached to the ownership of the soil; and such right is held subject to the public use of

the waters as a highway, and to the free passage of fish, and in subordination to the regulations to be prescribed by the legislature for the general good:" 3 Kent's Com. 418. The right of the state to keep open fish-sluiques, and to provide for the passage of fish in all streams, is a public right familiarly exercised in this state; but that, like the right to use the water for transportation, is consistent with, although superior to, the proprietary right in the owners of the soil, and differs altogether from that common right of fishing which belongs to every citizen in a river navigable by common law. If the public easement is satisfied by a part of the stream, or by its use at certain times, whatever remains belongs to the owner of the soil; but where there is no exclusive ownership of the soil, as in tide-water, the common right of fishing extends equally to every part of the river and to all times.

We have cases in which expressions have been used that plainly show the understanding of the judges who used them, that in this state all rivers navigable for boats are *juris publici* for fishing; and under those cases, connected with the public acts which show that the Catawba above and below the rock in question has been considered navigable, the defendant attempts to shelter himself. He is right in saying that if the river is *juris publici* for fishing, its whole width from bank to bank is so; and that a public canal around shoals may be regarded as a small branch of the river running round an island suddenly formed; therefore, that if the common right of fishing exists above and below the shoals, it exists also at the shoals. But the points decided in the cases upon which the defendant rests do not maintain the right he claims.

In *Boatwright v. Bookman*, Rice, 447, the questions concerning the legal character of the river (which there was the Congaree, at the shoals round which the Columbia canal passes), and concerning the ownership of the soil, were expressly reserved; but yet, in consideration of the right which the public had to use the river as a highway for transportation and the passage of fish, and in neglect of the distinction between a public easement in private property and a common right in things not subject to appropriation, it was taken for granted that "the right of taking fish there was common in equal degree to the whole community." The matter really adjudged was only that a plaintiff, who, under a license from the proprietor of the adjoining island, had placed a fish-trap so as not unlawfully to interrupt the navigation or the passage of fish,

might maintain trespass against the defendants who broke his trap. This is altogether consistent with the rule which gives an exclusive right of fishing to the riparian proprietor, subject to the right of the public to have unobstructed the navigation and passage of fish in the river, but is not plainly reconcilable with the notion of a common right in every citizen to fish in every part of the river; which latter right seems to forbid the continued enjoyment by any one of permanent fixtures in the river for his exclusive benefit.

The case of *Jackson v. Lewis*, Cheves L. 259 (relating to the Catawba river at a place a little higher up in the same shoals that the rock now in question stands in), again leaves undecided the questions which were reserved in *Boatwright v. Bookman*, but holds the defendant answerable in trespass for destroying the plaintiff's fish-trap; because, first, if the river was one in which there could be exclusive ownership of the soil, and of the right of fishing as incident thereto, the plaintiff's grant was oldest; and second, if the river was like one navigable at common law, the defendant had unlawfully disturbed the plaintiff in the actual enjoyment of that which was of common right, and which the plaintiff might therefore enjoy whilst he possessed it. The first view is, according to our opinion of the legal character of the river, conclusive; and in the judgment of this case, as of the two others we have examined, we entirely concur, whilst we dissent in each of them from some of the propositions that are advanced in the argument. It is thus seen that no case has been yet decided here which alters the common law as to the right of fishing in rivers where the tide does not ebb and flow, any more than as to the ownership of the soil therein. We feel safe in saying, concerning the right of fishing as we did concerning the ownership of the soil, that the common law is yet unchanged in this state—at any rate above the falls, which, in their natural state, obstructed the serviceable use of the rivers.

Looking, then, either to the finding of the jury upon the questions submitted to them, or to the deductions which the defendant has drawn from the public acts concerning this river, we see no reason to divest the plaintiff of the title which he has acquired to the rock in question, or to justify the defendant in the trespass he has committed on it.

The motion is dismissed.

O'NEAL, EVANS, FROST, and WITHERS, JJ., concurred.

Motions dismissed.

ADVERSE POSSESSION AS BAR IN LIMITATION OF ACTIONS.—In South Carolina, it was held that occupation of a spot for five or six weeks each year as a fishing-place was not a possession sufficient for the statute of limitations: *Jackson v. Lewis*, Cheves L. 259; nor will constant systematic trespasses in cutting down trees and carrying off timber give a person title to land by possession, under the statute: *White v. Reid*, 2 Nott & M. 534; and in another case, the court held that there must be a real and substantial inclosure, an actual occupancy, a *pedis possessio* definite, positive, and notorious, to give a title: *Bailey v. Irby*, 10 Am. Dec. 609. When the statute of limitations is relied on to resist the right of the true owner of land, the party relying upon it must show, by clear proof, his actual occupancy, continued, uninterrupted, and adverse, for the time required by the statute: *Irvine's Heirs v. McRee*, 42 Id. 468; and notes to *Wallace v. Hannum*, 34 Id. 663; and *Trotter v. Casaday*, 13 Id. 183.

PRESUMPTION OF POSSESSION WILL NOT ARISE FROM PERMISSIVE USE.—The occasional cutting of timber and boiling of sugar on land by the occupier of an adjoining tract is not such a possession as will give title under the statute of limitations: *Washabaugh v. Entriken*, 34 Pa. St. 74. Neither will the mere throwing of manure on another's land constitute such a possession as will give any right under the statute to him who does, much less to a third person: *Shroder v. Breneman*, 21 Id. 225; and see also the note to *Wright v. Guier*, 36 Am. Dec. 115, referring to other cases in this series where the subject has been treated fully.

WHEN DEED MAY BE PRESUMED.—A possession of land for more than twenty years by several persons consecutively, though neither held for that period, is enough to raise the presumption of a grant: *Thomson v. Peaks*, 7 Rich. 353. In New Hampshire, it was held that a jury might presume a deed of lands when the conduct of the parties for a long time can be reasonably explained only on the supposition that such a deed did exist, and there was nothing in the evidence to contradict such a supposition: *Wendell v. Moulton*, 26 N. H. 41. And a presumption of a deed may be indulged or permitted when there has been a long possession in aid of a title corresponding with the possession: *Baird v. Wolfe*, 4 McLean, 549; *Woodson v. Scott*, 1 Dana, 470; *Dutch Church v. Mott*, 7 Paige, 77; *Wallace v. Maxwell*, 7 Ired. L. 135. In the case of *Valentine v. Piper*, 33 Am. Dec. 715, we have an excellent illustration of the doctrine set forth in the cases above cited. There, it was held that the jury could presume a conveyance from long-continued and uninterrupted possession by the presumed grantee, without any adverse claim on the part of the presumed grantor or his heirs, and from other circumstances rendering such presumption reasonable, although no record of such conveyance be found, and that such presumption would also include everything necessary to give such conveyance effect; as, for instance, registration. The case of *Casey's Lessee v. Inloes*, 39 Id. 658, is another case in point bearing strongly upon the doctrine held in the principal case, and is also one which will bear careful reading. In the note appended to the same will be found a number of citations referring to cases appearing in this series.

PAROL EVIDENCE SHOWING DIFFERENT INTENTION from that which is expressed in a deed is inadmissible: *Hale v. Henrie*, 27 Am. Dec. 289; *Gardiner Mfg. Co. v. Heald*, 17 Id. 248; *Morton v. Jackson*, 40 Id. 109, and in several cases published in this series it was held that parol evidence was inadmissible to vary, contradict, or materially affect written instruments: *Adams v. Wilson*, 45 Id. 240; *Ewer v. Washington Ins. Co.*, 28 Id. 258; *Barringer v. Sneed*, 20 Id. 74; *Erwin v. Saunders*, 13 Id. 520.

ISLANDS, TITLE TO.—An island in an unnavigable river, not legally appropriated otherwise, if on one side of the dividing line, belongs to the owner of the bank on that side; if in the middle of the river, the owners of the banks hold it in severalty, according to the original dividing line, as if there was no island in the river. If there are several borderers, the island is apportioned according to their lines on the main: *Ingraham v. Wilkinson*, 16 Am. Dec. 342. When an island is so formed in the bed of a river not navigable as to divide the channel and lie partly on each side of the thread of the river, it will be divided between the riparian proprietors on the opposite sides of the river, according to the original thread of the river: *Deerfield v. Arms*, 28 Id. 276.

EXTENT OF BOUNDARIES OF LAND BOUNDED BY WATERCOURSE ABOVE TIDE-WATER.—A grant of land bounded on a stream not navigable carries the exclusive right and title of the grantee to the middle of the stream, unless the terms of the grant clearly show an intention to stop at the margin: *Lowell v. Robinson et al.*, 33 Am. Dec. 671. See also the notes appended to the following cases: *Luce v. Carley*, 35 Id. 637; *Williams v. Buchanan*, Id. 760; *Middleton v. Pritchard*, 38 Id. 112, referring to other cases appearing in this series, where the same doctrine was held.

COLEMAN v. FRAZIER.

[4 RICHARDSON'S LAW, 146.]

POSTMASTER IS LIABLE FOR HIS SERVANT'S NEGLIGENCE, CARELESSNESS, AND DEFAULT, as well as his own, and a civil action will lie for a larceny of a letter containing money which was stolen from his office.

ASSISTANT POSTMASTER IS MERELY SERVANT, OR AGENT OF POSTMASTER, and the doctrine of the common law, that the principal who holds out an agent or servant in any public employment is liable in case for his negligence, will apply.

VOLUNTARY ADMISSIONS MADE BY WITNESS AGAINST HIS INTERESTS of an act subjecting him to infamy and punishment will be admissible as evidence of a fact between third persons.

DECLARATION BY DECEASED WITNESS MADE IN PRESENCE OF DEFENDANT is admissible as evidence against the defendant.

CASE to recover from the defendant, a postmaster at Edgefield, a sum of money contained in a letter mailed by the plaintiffs and addressed to parties in Charleston. The letter was stolen from the Edgefield post-office by one Meigs, who had access to the office and received and delivered letters, the latter fact being well known in the village. There was no proof tending to show that the defendant was in the habit of performing these duties. Meigs shortly before his death informed the defendant that he had stolen the money, and testimony to that fact was introduced during the trial, to which the defendant objected. When the plaintiffs closed, the defendant moved for a nonsuit, but the motion was not granted. The jury found a verdict for the plaintiffs, and defendant appealed.

Griffin, for the plaintiffs.

Bauskett, for the defendant.

By Court, O'NEALL, J. It is true that the court of errors, in *State v. McBride*, Rice, 400, held that the court had no jurisdiction over the offense of stealing a letter from the mail, and reversed the case of *State v. Wells*, 2 Hill (S. C.), 687; but, in so holding, it was not intended to disclaim jurisdiction of cases where the rights of parties, *civiliter*, were concerned. The plaintiffs here claim for an injury done to them by an officer of the United States, in the discharge of his duties, or rather in failing to properly discharge them. Is there anything in the constitution or laws of the United States which forbids our courts from trying such a case? Certainly not. Indeed, the right to hear, try, and determine such a matter is a part of the common-law jurisdiction of the courts of law of South Carolina, and unless in the constitution of the United States it has been surrendered, it still remains.

The court, in *Bolan v. Williamson & Chapman*, 2 Bay, 551, better reported in 1 Brev. 181, held jurisdiction of such a case as indisputable. So in *Franklin v. Low & Swartwout*, 1 Johns. 396, a similar jurisdiction was exercised. It cannot be necessary to pursue this further.

The next question is, whether the declaration is sufficient. The first count charges that the loss was sustained "through the negligence, carelessness, and default of the postmaster, his servants, agents, or deputies;" the second count charges the loss to have occurred from the defendant not properly superintending his clerks or agents.

I think either count sufficient. The first charges the defendant generally with negligence in the discharge of the duties of his office; and that the plaintiffs' loss arose therefrom. This is clearly sufficient, if Ward, his assistant, is to be regarded as his mere servant: 1 Ch. Pl. 382. That this is the true notion is apparent when it is remembered that the defendant was the only person legally known as postmaster at Edgefield. The fifty-first regulation of the post-office declares that he shall not be permitted to transfer the charge of his office and the performance of its duties to another.

The fifty-third regulation provides, "that the duties of his office must be performed only by himself personally, or by a sworn assistant, or assistants, whom he may employ to aid him when necessary; for the care and attention of every one of whom he will be responsible to the department." These regu-

lations show very plainly that his assistant is no officer of the government, and that he is responsible for everything as done by himself.

It is true, however, the case of *Dunlap v. Munroe*, 7 Cranch, 242, 269, does sanction the doctrine, that to charge the postmaster for the neglect of his assistants, it is necessary to state the injury according to the facts, and that the postmaster's liability will then result from his own neglect in not properly superintending the discharge of the duties of his office. This view of the law is met by the second count, and the defendant has therefore no ground to complain.

The next question is, Was the defendant liable for the negligence of his assistant, Ward? That he was is, I think, clear on principle. The fifty-third regulation, above cited, shows that Ward was the mere employee of the defendant; he is in no sense a public officer. There is no plainer doctrine of the common law than that the principal who holds out an agent or servant in any public employment is liable in case for his negligence: *Drayton v. Moore*, Dudley, 268; *Parker & Co. v. Gordon*, Id. 270.

The same result is attained against a postmaster by *Bolan v. Williamson & Chapman*, 1 Brev. 181, for in that case the court held that the postmaster was liable for a loss occasioned by negligence in his office; that his assistant was not liable to the party sustaining the loss, unless he is an officer of the department. It is clear from the post-office regulations that he is not such officer, and it therefore clearly follows, from that case, the postmaster is liable. Judge Brevard gives the true point of that decision, to wit, the verdict against the postmaster and his assistant could not be sustained, as both were not liable. The court did not do what it might have done, and held the verdict to have been good against the postmaster alone, and permitted the plaintiff to discontinue as to his assistant.

But this case, when properly understood, removes all difficulty; the postmaster is sought to be charged for negligence in his assistant, whereby the plaintiffs' money was stolen. The sixty-first regulation provides "that a postmaster will suffer no person whatever, except his duly sworn assistants, or clerk and letter-carriers, who may also have been sworn, to have access to the letters, newspapers, and packets in his office, or whatever constitutes a part of the mail, or to the mail keys." Meigs, the unfortunate guilty man, who forfeited all the good results of a previous well-spent life, by yielding to

the temptation presented to him, in his dying condition, to provide for his family, by taking that which did not belong to him, had "access to the letters, newspapers, and packets" in the post-office, and thereby stole the money of the plaintiffs. This was by the neglect of Ward; he ought not to have permitted it; and the defendant having "in person the general superintendence of his office," as required by the fifty-second regulation, ought to have corrected this very matter, and hence in the very terms of the second count he is liable. It follows, too, that the negligence of his assistant is his negligence, and therefore his liability arose as the judge stated it to the jury.

From this view of the defendant's liability which arises from Ward's act, it follows that he was an incompetent witness for the defendant. For he is liable over to the defendant: *Parker & Co. v. Gordon*, Dudley, 272.

The only remaining question is, whether Meigs's admission that he stole the letter containing the money was competent. I placed its admission on two grounds: 1. That the defendant was present, heard it, and received it as true; and 2. That it was the admission of an act committed by the party making it, against his interest, and subjecting him to infamy and heavy penal consequences, and who was dead at the trial.

In either or both of these points of view, I think the evidence was admissible, but more especially when both are combined.

It is true that the defendant had no knowledge of the act, and cannot, therefore, from his presence and silence, be presumed to have admitted it to be true, because he knew it to be so. But this is not necessary to make it evidence, on that account. He was one of those seeking for the truth, and the ascertainment of which was very important to him. When, therefore, Meigs made the confession, and he received and acted on it as true, which he did, he cannot afterwards be allowed to say, it is no evidence against me. It is, as to him, *prima facie* evidence of the fact. He could relieve himself of its effect by showing that, in fact, Meigs was not the guilty man, or that he received it as true by mistake. But on the second ground, I think it is true that a declaration made by the party who does the act, as in this case stealing the letter containing the money, is admissible. It is very true that the rule, that where an entry or declaration, made by a deceased person, is against the interest of the party making it, it is admissible as evidence, was qualified by *Gilchrist & King v. Martin & West*, Bail. Eq. 492, and was restricted to cases where there was no interest to falsify the fact that it was

made against the interest of the person making it, and that the entry or declaration was so ancient as to preclude suspicion that it was manufactured for the occasion. Under it alone, therefore, this declaration would not be admissible. But when it is remembered that this is not a matter of business like those spoken of in that case, but was a criminal act, of which none could be so cognizant as the party, I think a reason will be found for its admission, arising out of the rule as qualified in the case just alluded to. The admission of such testimony arises from necessity, and the certainty that it is true, from the want of motive to falsify. Both these are apparent here.

In *Wright, Lessee of Clymer v. Littler*, 1 W. Black. 345, it is stated by the reporter, as a principle of the case, that a confession, by a deceased witness, that he forged the will of 1845, may be admissible. This is the very case before us. Yet it seems that the evidence was received, without objection, on the circuit; the objection was taken on the motion for new trial. Lord Mansfield said: "As to the fact, the admissibility or competence must result from the particular circumstances of the case." He states those circumstances which show that the deceased had no interest to state an untruth, and therefore he says: "I think it admissible." So here we have every guaranty of its truthfulness—the grave consequences of infamy, and at the least, ten years' imprisonment, would certainly insure the truth of the speaker. To this let it be added that the defendant was present, and received it as true, and do we not stand on at least as certain grounds as Lord Mansfield assumed to be sufficient on that occasion?

The motions for a nonsuit or new trial are dismissed.

FROST, WITHERS, and WHITNER, JJ., concurred.

EVANS, J. I concur on all the grounds except the admissibility of Meigs's confessions; of this I have some doubt.

WARDLAW, J. I assent to all except the instructions which held the postmaster liable for the negligence of his assistant, without inquiry into any negligence of the postmaster in his duty of superintending.

Motions dismissed.

LIABILITY OF POSTMASTER, and its enforcement by civil action: See the note to *Conwell v. Voorhees*, 42 Am. Dec. 208, where the subject is treated at considerable length. See also note to *Teall v. Felton*, 49 Id. 358. In *United States v. Morrison*, Chase, 521, the court held that no accident or misadventure will relieve a postmaster and his sureties for property intrusted to the former.

ADMISSIONS—DECLARATIONS AGAINST INTEREST, EFFECT OF.—Declarations or statements of facts made by a deceased person at variance with his interests, which he is presumed to have had a competent knowledge of, or which it was his duty to know, and in respect to which he could have been examined as a witness if alive, are, if pertinent to the matter of inquiry, admissible in evidence as between third parties, whether made at the time of the fact declared or afterwards: *White v. Choteau*, 1 E. D. Smith, 493; *Pease v. Jenkins*, 10 Ired. L. 355; *Alleghany v. Wilson*, 25 Pa. St. 332; *Taylor v. Gould*, 57 Id. 152; *Cruger v. Daniel*, 1 McMull. Eq. 157; *Myers v. Brownell*, 16 Am. Dec. 729; *Richardson v. Richardson*, 30 Id. 544.

SMITHPETER v. ISON'S ADMINISTRATORS.

[4 RICHARDSON'S LAW, 203.]

PRESUMPTION OF PAYMENT ARISING FROM LAPSE OF TIME, in cases to which the statute of limitations does not apply, may create the belief of payment, but is of itself insufficient to justify a verdict solely on that ground. **PRESUMPTION OF PAYMENT RAISED FROM DEFINITE TIME** no more permits a jury to give to a shorter time a force beyond its natural efficacy in producing belief than the bar under the statute of limitations permits a near approach to the statutory period to avail; and a verdict found in contravention of the principle herein stated will be set aside.

ASSUMPSIT. Action brought by Michael Smithpeter against the administrators of Frederick Ison to recover the amount due on two notes executed by the intestate in 1832. Suit was not entered until 1849. The defendants relied upon the presumption that the notes had been paid, basing the same upon the fact that the intestate was in good circumstances at the date of the execution of the notes, and continued so up to his death, and no efforts were made either in his life-time or since his death to collect the money claimed to be due upon them. The court instructed the jury that "the question was simply a matter of belief, arising from the evidence. If they were convinced by it that the notes had been paid, the verdict must be for the defendants; if not, for the plaintiff—that the law did not presume the debts paid by the lapse of twenty years." The jury returned a verdict for the defendants, and plaintiff appealed.

Thomson, for the plaintiff.

Dawkins, for the defendants.

By Court, **WARDLAW, J.** From admissions at the bar, it appears that in this case the plaintiff had in his possession, and offered in evidence, a paper signed by the intestate, Ison, but not sealed. dated about the same time as the single bills,

whereby Ison promised to pay to the plaintiff twelve dollars for his expenses if the plaintiff should have to come for his money; and further, that on one of these single bills a suit was brought by the plaintiff against a surety, and at the same term when this case was tried, a verdict therein was rendered for the plaintiff, the same evidence having been given therein as was given in this case, except that the paper above mentioned was not offered, and that the defendant there attempted to show the unsoundness of a horse, for which the single bill was given.

From the paper above mentioned, it has been said, an inference arises that Ison had undertaken to send the money to the plaintiff; and thence is argued the probability of payment consistent with the possession of the single bills by the plaintiff. Admitting that the defendant had undertaken to send, the fact of sending is not to be presumed upon less evidence than the more general fact of payment; and, as it was likely to involve the agency and knowledge of third persons, would probably have been susceptible of more easy proof than a direct payment from Ison to the plaintiff might have been. The unexplained possession of the papers by the plaintiff, without complaint or inquiry by Ison, contradicts the supposition of money having been sent in any business-like mode as much as it does the supposition of direct payment.

There are, then, contradictory verdicts upon what may be considered the same evidence, and for that reason, less weight than ordinary should be given to the verdict here. The law was correctly expounded to the jury. The artificial presumption of payment, in cases to which the statute of limitations does not apply, arises from the lapse of twenty years unrebutted; a shorter lapse of time is only a circumstance, which may, with others, create the belief of payment, but is of itself insufficient. The ability of Ison to pay, his death, the probability that as a trader the plaintiff would need money, and the inferences from the paper above mentioned, are the circumstances which, it is contended, so increase the force of sixteen years that lapsed without demand shown, as to constitute just ground for belief that the money has been paid. These circumstances involve the absence of the plaintiff from the state, and give us no information as to his habits or motions. They are so easily reconcilable with the strong disproof of payment, which arises from the plaintiff's possession of the single bills, that the effect which has been given to them suggests a sus-

picion that the jury did not really believe that the money had been paid; but, from evidence not before them, thought it ought not to be paid.

The presumption raised from a definite time no more permits a jury to give to a shorter time a force beyond its natural efficacy in producing belief than the bar under the statute of limitations permits a near approach to the statutory period to avail.

In the case of *Executors of Blake v. Executors of Quash*, 3 McCord, 340, much relied on for the defendants, it will be seen, from a careful examination of the opinion, that thirty-eight years had intervened between the last payment by an executor and the commencement of the suit; that the heir at law, who had made a payment fourteen years before the commencement, had not the means of knowing whether the bond had been paid, and had, ever afterwards, lived in the same street with the holder of the bond; that, according to a proper calculation of interest, the payments which had been made entirely discharged the bond; and that the assets of their testator had been distributed by the defendants more than twenty years before the suit was brought.

In the present case, as in the case of *Executors of Wightman v. Butler*, 2 Spears, 357, we must restrain the latitude of discretion, under which juries sometimes disregard the legal effect of contracts. He who affixes his seal to a promise to pay must know that no time short of twenty years will of itself bar his obligation, and insufficient circumstances must not be allowed to change the law, under pretense of their creating a belief of payment.

A new trial is ordered.

O'NEALL, EVANS, FROST, and WITHERS, JJ., concurred.

Motion granted.

WHEN PAYMENT ARISING FROM LAPSE OF TIME MAY BE PRESUMED.—The lapse of a number of years, though less than sufficient to bar an action under the statute of limitations, may afford a presumption of payment, which, if supported by other facts, may amount to full proof: *Davenport v. Labanol*, 5 La. Ann. 140; *Copley v. Edwards*, Id. 647; *Wooten v. Harrison*, 9 Id. 234; *Fleming v. Emory*, 5 Harr. 46; *Millidge v. Gardner*, 33 Ga. 397; *Tightman v. Fisher*, 9 Watta, 441; *Williams v. Sims*, 1 Rich. Eq. 53; *Atkinson v. Dance*, 9 Yerg. 424. The law gives to the lapse of time an artificial and technical weight beyond that which it would naturally have, as a mere circumstance bearing on the question of payment: *Walker v. Wright*, 2 Jones L. 155. And slight circumstances might be left to the jury on the issue of payment of a bond when sixteen years have elapsed: *Blackburn v. Squibb*, Peck, 60. Payment may be presumed from lapse of time; but where the payment

is disproved, the mere lapse of time is no bar to an action: *Everts v. Nason*, 11 Vt. 122. And in another case decided in Vermont, it was held that the lapse of twenty years was necessary to raise a presumption of payment in a case not coming within any of the statutes of limitations: *Sparhawk v. Buell*, 9 Id. 41. Where the presumption of payment depends on time alone, nothing short of twenty years will raise it: *Rogers v. Burns*, 27 Pa. St. 525. The presumption of payment arising from lapse of time is not an absolute bar, but it may be rebutted by circumstances explaining the delay: *Bailey v. Jackson*, 8 Am. Dec. 309; *Gulick v. Loder*, 23 Id. 711. And a presumption of payment of a bond may be raised by a lapse of less than the statutory time, when taken in connection with other evidences; but in the absence of other circumstances, the full statutory time must expire to raise that presumption: *Henderson v. Leeds*, 11 Id. 733.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

GANT v. GANT.

[10 HUMPHREYS, 464.]

DEPENDANT IN CONTEMPT CAN NEITHER FILE ANSWER nor be permitted to make a motion to dismiss a bill, until he be discharged of such contempt by order of the court.

CLERK OF COURT HAS NO AUTHORITY EITHER TO DISCHARGE CONTEMPT OR FILE ANSWER; and if an answer is filed, the plaintiff has the right to treat it as a nullity.

BILL for a divorce. The facts are stated in the opinion.

W. R. Harris and R. P. Rains, for the plaintiff.

S. Williams, for the defendant.

By Court, **McKINNEY, J.** The chancellor, on motion of the defendant's solicitor, dismissed the bill in this case for want of prosecution, under the act of 1801, c. 6. The bill was for a divorce. Process of subpoena to answer was issued, but service thereof was evaded. An attachment for contempt for violation of an injunction was also issued in the cause, the service of which was likewise evaded.

It appears that at the February rules, 1848, an answer purporting to have been prepared and sworn to in the state of Mississippi, was received by the clerk and master at rules in his office, and was indorsed by him as filed in the cause. It seems that no notice was taken of the answer; nor does it appear from the record before us that any step was taken in the cause by the complainant after the same was filed. During the second term after the answer was received by the clerk, the motion to dismiss the bill for want of prosecution was allowed.

In allowing this motion, the chancellor erred. The defendant was in contempt, and being so, his answer could not be received, nor could he be heard to make a motion to dismiss, till the contempt was cleared; and for the purpose of being discharged from the contempt, an order of the chancellor in court was necessary, unless the contempt had been waived: 1 Daniell's Ch. Pr. 559, 560; 1 Smith's Ch. Pr., 2d Am. ed., 62, note a.

The clerk had no authority to discharge the contempt or to receive the answer. It was improperly placed on file, and the complainant had the right to treat it as a nullity.

The order of the chancellor will be reversed, and the cause be remanded and reinstated upon the docket of the chancery court.

APPLICATION OF PARTY IN CONTEMPT FOR FAVOR, and not for a matter of strict right, will not be granted until he has purged himself of the contempt: *Johnson v. Pinney*, 19 Am. Dec. 459.

COMPLAINANT NEED NOT ACCEPT ANSWER OF DEFENDANT in contempt for not answering, but if he does so without insisting on his costs, he cannot afterwards object that they have not been paid.

CONTEMPT OF COURT, AS TO WHAT CONSTITUTES: See *Neel v. State*, 50 Am. Dec. 209; *Smith v. Brown*, 49 Id. 748, and cases cited in note to *State v. Woodfin*, 42 Id. 162.

RICE v. RAGLAND.

[10 HUMPHREYS, 545.]

BILL OF EXCHANGE IS ORDER IN WRITING directing one person to pay money to a third person.

STATEMENT OF CONSIDERATION EXPLAINING why a bill of exchange was drawn will not invalidate it.

ERRONEOUS OR IMPERFECT DESCRIPTION OF NAME OF PARTY to a note, bill, or bond may be cured by averment and often by intendment.

BILL MUST BE ACCEPTED BY PERSON INTENDED AS DRAWN thereof, or if he refuse to accept, then by a third person for honor, or where the bill states no drawee, then by a third person in that character; but when accepted in either way, the party accepting only is liable as acceptor.

DEMAND MUST BE MADE OF ACCEPTOR, and if made on any other person, will be improper.

INDORSER CANNOT FREE HIMSELF FROM LIABILITY to a remote indorsee without notice by an agreement to that effect with any other indorsee.

SPECIAL AGREEMENT BETWEEN ORIGINAL PARTIES to a bill of exchange, if not indicated by the paper itself, cannot be set up against a purchaser without notice and for value.

ASSUMPSIT. The facts are sufficiently stated in the opinion.

H. G. Smith, for the plaintiffs.

T. J. Turley and W. T. Brown, for the defendant.

By Court, TOTTEN, J. The action was *assumpsit*, and was tried on the plea of *non-assumpsit* in the circuit court of Shelby, on the twenty-fifth of January, 1845; the verdict was against the Memphis City Hotel Company and John Parks, and in favor of George O. Ragland. The plaintiffs' motion for a new trial as to said Ragland having been overruled, and judgment entered on the verdict, a bill of exceptions was taken and filed, and a writ of error has been prosecuted to this court.

It appears from the record that the action was founded on a bill of exchange, dated March, 1842, drawn by Hickman & Austin, and addressed in terms to the "building committee of the City hotel in Memphis," and ordering them to pay Mr. George O. Ragland one thousand four hundred and seventy-two dollars, the amount due him on settlement on the second and third payments for building said hotel. It was presented by said Ragland, the payee, to J. Parks, president of said Memphis City Hotel Company, and by him accepted in pursuance of an order of the company, payable half on the twenty-first of August, 1842, and half on the twenty-first of February, 1843, which mode of acceptance was received by said Ragland. On the fifteenth of May, said Ragland credited the bill with one half of its amount and thirty-four dollars and thirty-six cents on the other half. After this partial payment, said Ragland indorsed the bill "to John Parks or order," and he indorsed it to plaintiffs. At the maturity of the bill, as accepted, the plaintiffs, as holders thereof, caused payment to be demanded of J. Parks, as president of the Memphis City Hotel Company, and it being refused, the bill was protested for non-payment, and the defendant duly notified.

It further appears that the Memphis City Hotel Company was first formed as a joint-stock company, and on the twenty-sixth of January, 1842, the same was incorporated; that the building committee consisted of four of the five directors of said company, the said J. Parks being one of them.

The court charged the jury that the indorsers would not be liable, unless demand of payment had been made of the said building committee of said hotel company, and also of the Memphis City Hotel Company, as drawees of the bill. The court also charged that if it were agreed between said defendants, Ragland and Parks, at the time of the indorsement by

the former to the latter that he, Ragland, should not be liable thereon, in such case, he would not be liable, that is, not liable to a subsequent holder.

Several questions have been made. On the part of the plaintiffs it is insisted that there is error in the charge of the court. The charge assumes that the bill should be presented for payment to two separate drawees thereof, that is, to the building committee of the City hotel, and to the Memphis City Hotel Company. Now, it seems to be perfectly well settled that there cannot be a series of successive acceptors upon the same bill. It must be accepted by the person intended as the drawee thereof, or if he refuse to accept, then by a third person for honor, or where the bill states no drawee, then by a person in that character: See *Polhill v. Walter*, 3 Barn. & Adol. 114; Ch. Bills, 183; Story on Bills, sec. 254. But when accepted in either way, the party so accepting, and he only, is liable as acceptor: Ch. Bills, 311, c. 7, ed. 1833; *Jackson v. Hudson*, 2 Camp. 447; *Moies v. Bird*, 11 Mass. 436 [6 Am. Dec. 179]; Story on Bills, sec. 254.

In the present case, the drawees are described as the building committee of the hotel company; the hotel company accepts the bill, and the holder received such acceptance, as being the one to which he was entitled, as payee and holder of the bill. It is evident that the building committee of the hotel company are not intended as drawee, separate and independent of the company of which they are described as being merely a committee. If they had power to accept the bill at all, it would be merely for and on behalf of the company they represented, and the acceptance would be the acceptance of the company. We think then that the acceptance of the company by its own proper act was a good acceptance; it was, in fact, the drawee intended by the bill, although it is called by an imperfect description.

The Memphis City Hotel Company having accepted the bill as the drawee described and intended, it alone became liable as acceptor, and it was not proper to demand payment of another. We also think his honor erred in his charge in reference to the liability of Ragland. He was the payee, and indorsed the bill to "John Parks or order," who indorsed it to plaintiffs.

Now as between Ragland and Parks, it is very probable that any agreement between them that the former should not be liable to the latter, as an indorser is liable, might be enforced; it certainly would have been the more proper course to have

qualified his liability if such were intended, in the terms of the indorsement. But however this may be, as between those parties, such understanding in opposition to the terms of the indorsement could not affect a subsequent *bona fide* holder of the paper, or exempt the indorser from liability according to the terms of the indorsement. The indorsement is equivalent, in its effect, to the drawing of a bill, the indorser being in almost every respect considered as a new drawee, or the original drawee, and it amounts, in legal effect, to a contract on the part of the indorser, with and in favor of his indorsee and every subsequent holder, that the instrument itself and all antecedent signatures thereon are genuine; that it will be paid on due presentment at maturity by the party who is liable to pay it, and if not, that he, the indorser, on being duly notified of its dishonor, will pay the same to the holder. The undertaking of the indorser in favor of his indorsee or any subsequent holder, is the same as that which is implied on the part of the drawer by drawing the bill. And as the drawer undertakes that the acceptor shall pay the bill on presentment when it becomes payable, so the indorser of an accepted bill undertakes that the acceptor shall pay it: See *Murray v. Judah*, 6 Cow. 484; *Burrill v. Smith*, 7 Pick. 291, 294; *Pease v. Turner*, 3 How. (Miss.) 875; Ch. Bills, 241; Story on Bills, secs. 107, 108.

Now as the bill in question was accepted by a person corresponding with the description of the drawee, can there be any doubt but that the undertaking of the indorser, who had procured the acceptance, was, that if the said acceptor did not pay the bill on due presentment, that he, the indorser, on notice of its dishonor, would pay it? We think the holder of the bill was bound, under the circumstances of this case, to make demand of the person whose acceptance the indorser had procured, and that a demand of any other supposed drawee would have been improper.

As to the question of variance which has been discussed, we do not think it arises in the case. The instrument appears to be truly and accurately described in the declaration, with an averment that by the address to "the building committee of the City hotel in Memphis," was meant and intended the Memphis City Hotel Company. If this were so, it was entirely proper and competent to make the averment. But the plea of *non assumpsit*, not verified, does not therefore admit the truth of the averment; it only admits the paper as it appears on its face, and the truth of the averment not being admitted, must be proved as in other cases.

There can be no doubt that an erroneous or imperfect description of the name of a party to a note, bill, or bond, may be cured by averment, and often by intendment: *New York African Society v. Varick*, 13 Johns. 38; *Medway Cotton Man. v. Adams*, 10 Mass. 360; *Leaphardt v. Sloan*, 5 Blackf. 278; *Angell & Ames on Corp.* 513.

The last question to be noticed is the objection made by defendant's counsel, that the paper sued on is not, in legal contemplation, a bill of exchange, and that therefore no such rights and liabilities as those of holder and indorser can arise on it.

No precise form is necessary to a bill of exchange; "it is an open letter of request by one person to another to pay money," and "it will be sufficient if it be in writing and contain an order, directed by one person to another absolutely, to pay money to a third person, and cannot be complied with and performed without the payment of money:" See *Story on Bills*, sec. 33; *Ch. Bills*, 127. "If it be payable out of a particular fund only, or upon an event which is contingent, or if it be otherwise conditioned, it is not in contemplation of law a bill of exchange:" *Story on Bills*, sec. 46.

Now the paper in question is an order made by the drawers on the drawee to pay to George O. Ragland one thousand four hundred and seventy-two dollars; so far it is a compliance with the best forms to be found in the books. But it adds this explanation or remark: "The amount due him on settlement on the second and third payments for building said hotel," and it is supposed that this latter part vitiates it as a bill.

Whether it is a bill or not must be determined from the face of the instrument itself, and not from any extrinsic proof. The proof offered in the court below to show on what account the bill was drawn was wholly irrelevant to the question. It matters not on what account the bill is drawn, whether on funds or credit, provided the bill be not conditioned or payable out of a "particular fund only." Now this bill is not payable out of a particular fund only, nor is it conditioned, but is payable absolutely. It is said that a bill drawn by a freighter on a third person, payable to a person entitled to receive the freight "on account of freight" is good; for it is not payable out of a particular fund, but merely shows to what account it is to be applied, or what is the value which has been received: *Pierson v. Dunlop*, 2 Cowp. 571; *Bayley on Bills*, c. 2, sec. 6, p. 18; *Story on Bills*, sec. 47.

The judgment will therefore be reversed, and the cause remanded for further proceedings.

BILL OF EXCHANGE, WHAT CONSTITUTES: See *Cook v. Satterlee*, 16 Am. Dec. 432; *Nolan v. Ringgold*, 5 Id. 435; *Gerard v. La Coste*, 1 Id. 236; *Kendall v. Galpin*, 32 Id. 141; and note to *Cota v. Buck*, 41 Id. 465, referring to cases appearing in this series.

DEMAND AND NOTICE NECESSARY.—An indorser of a note or bill is not liable until payment has been demanded of the maker or acceptor: *Ecfert v. Des Combes*, 12 Am. Dec. 609; *Galpin v. Hard*, 15 Id. 640; *Haddock v. Murray*, 8 Id. 43.

LIABILITY OF ACCOMMODATION INDORSERS, ACCEPTORS, OR MAKERS.—An indorser of an accommodation note is liable over to subsequent indorsers, unless he has regulated that matter otherwise by particular agreement with them: *Knorr v. Dixon*, 23 Am. Dec. 488; *Nash v. Skinner*, 36 Id. 338; *Kimbrow v. Lytle*, 31 Id. 585.

OHIO LIFE INSURANCE AND TRUST CO. v. MERCHANTS' INSURANCE AND TRUST CO.

[11 HUMPHREYS, 1.]

ACTION OR SUIT UPON ILLEGAL CONTRACT cannot be maintained either at law or in equity.

CONTRACT IN VIOLATION OF COMMON OR STATUTE LAW IS VOID *ab initio*, and no action or suit will lie to enforce it.

RULE PREVENTING SUIT ON ILLEGAL CONTRACTS RELATES ONLY TO REMEDY, and merely denies the parties any remedy upon them.

PROPERTY SOLD UPON ILLEGAL OR FRAUDULENT CONSIDERATION has the effect to pass *ti le* to the vendee; but the parties have no remedy against each other.

CONTRACT IS ILLEGAL WHEN IT VIOLATES GOOD MORALS, or is opposed to public policy, or is infected with fraud, or violates the provisions of a public statute.

CONTRACTS VIOLATING PUBLIC STATUTE are equally void whether the prohibition is express or implied; *i. e.*, whether the statute expressly prohibits the thing to be done, or only imposes a penalty on the person doing it.

WHETHER CONTRACT IS MALUM PROHIBITUM OR MALUM IN SE, is not material; for in either case the courts will not enforce it.

UPON REPUDIATING ILLEGAL CONTRACT, RECOVERY MAY BE HAD in some instances for money paid as consideration, or an action may be maintained to cancel securities given.

UPON CONTRACT INVOLVING MORAL TURPITUDE, where the parties are in *pari delicto*, there is no remedy; no relief will be granted, no action will lie to enforce it, and money paid upon it cannot be recovered.

UPON ILLEGAL CONTRACT, WHERE PARTIES ARE NOT IN PARI DELICTO, relief will in general be granted on disaffirmance of the contract, if it be executed; if it be executory, it is the general rule to grant relief against it.

UPON ILLEGAL EXECUTORY CONTRACTS, RELIEF WILL BE ALLOWED, whether the parties were in *pari delicto* or not.

PARTY IS NOT IN PARI DELICTO when he acts under necessity, or hardship, or great inequality of condition, in entering into a contract in violation of a rule of public policy intended for his protection.

ACCEPTING RIGHTS AND PRIVILEGES ENTAILS OBLIGATIONS AND DUTIES.—

Where an act gives a corporation all the "rights and privileges" formerly given to another corporation, the words must be understood as implying the obligations and duties also.

INSURANCE COMPANY CANNOT DO BANKING BUSINESS where the franchise is a grant of powers as an insurance and trust company only

RESTRICTIONS ON CORPORATION NOT "TO EXERCISE BANKING PRIVILEGES," or issue "bills of credit," etc., are directed only against the business of banking as a pursuit.

INSURANCE CORPORATION MAY BORROW MONEY, RECEIVE DEPOSITS, and draw or purchase drafts or checks in its proper business in exercising powers incidental to the use and enjoyment of its franchise.

CORPORATE POWERS NOT EXPRESSLY MENTIONED IN ITS CHARTER.—A corporation in the execution of the purposes for which it was created, may resort to any means that would be proper for an individual in executing the same, unless it be prohibited by the terms of the charter or by some public law.

RESIDENCE OF CORPORATION is in the state creating it, and it cannot migrate from it.

CORPORATION MAY ACT IN FOREIGN STATE, and upon being recognized there, may by its agents make any contract within its limited powers which are not prohibited by the foreign state.

CORPORATION IS LIABLE FOR ACTS OF ITS AGENTS done in the performance of or connected with the business of the agency.

AGENT OR OFFICER OF CORPORATION IS LIABLE for damages occasioned by violation of duties he owes to his principal.

CAPITAL STOCK IS TRUST FUND, and the directors of the corporation are the trustees.

STOCKHOLDERS' LIABILITY FOR CORPORATE ACTS under a clause in the charter declaring that they "shall be liable to the extent of their respective shares of stock held in such company, and no further," is wholly without reference to the amount they may have paid on the stock.

ASSIGNMENT OF CORPORATE PROPERTY DOES NOT CARRY CAPITAL STOCK WITH IT.

MULTIFARIOUS BILL—IMPROPER JOINDER OF PARTIES AND CAUSES OF ACTION.—A bill which seeks to enforce several separate demands against a corporation as such, against the stockholders as such, against them in their private capacity, and against them as trustees of the capital stock, and also as trustees in a deed of assignment for the benefit of creditors, and which seeks to set aside the assignment and subject the property conveyed by it to the payment of the complainant's claims, is clearly multifarious.

THE opinion states the facts.

Washington, Fogg, and Nicholson, for the complainant.

White, Meigs, Trimble, and E. Ewing, for the defendant.

By Court, TOTTEN, J. The prominent and leading facts of this case, as they appear in the bill, and are admitted by the demurrer, are these: The complainant was incorporated by the legislature of Ohio, in the year 1834, with plenary powers as

an insurance and trust company, and with power to receive money in trust, and to accumulate the same at interest, and to allow such interest, thereon as may be agreed on; to accept and execute all such trusts of every description as may be committed to it by any person whatever; to buy and sell drafts and bills of exchange; and in a word, power to make and execute on its part the contracts and agreements set forth in the bill. The complainant established an agency, called a "transfer office," in the city of New York, and one William M. Vermilye was its agent and cashier at said office from 1843 until nearly the end of the year 1848. There was no law in the state of New York prohibiting the complainant to exercise any of its functions and powers aforesaid in said state.

The Merchants' Insurance and Trust Company of Nashville was incorporated in 1840, with a capital stock of one hundred thousand dollars, and to have the same rights and privileges as the Knoxville Marine Fire Insurance and Life and Trust Company, incorporated in January, 1833. The rights, powers, and responsibilities created by this charter will be more fully considered and stated hereafter.

The stock having been promptly subscribed, twenty-five thousand dollars only were paid in, and the balance secured by note or otherwise to the corporation, and it commenced and continued in business under its charter, or in the name of its charter. It is further charged that the said twenty-five thousand dollars so paid in were afterwards refunded out of the profits and dividends; and the balance of the stock, if paid at all, was likewise paid out of the profits and dividends of said company. That soon after this company was incorporated, it established agencies at New Orleans and Philadelphia, at which agencies, and at the principal office in Nashville, it assumed and exercised the business and functions of banking; by dealing in exchange; buying and selling the same; by issuing checks or drafts upon Nashville, New Orleans, New York, and elsewhere, and receiving money therefor; by buying and selling bills of exchange and promissory notes; by receiving money on deposit, and by borrowing money at interest. That said corporation also did a considerable business as an insurance and trust company, properly and legitimately within the provisions of its charter. That a very large and extended business was done by said corporation; its semi-annual dividends often amounting to twenty-five per cent on its nominal amount of capital stock. It is further stated that in March,

1846, a bill was filed in chancery at Nashville, in the name of the state of Tennessee, against said Merchants' Insurance and Trust Company of Nashville, to enjoin it and its agents from dealing in bills of exchange and other banking business; on the twelfth of May, 1847, a decree was made, granting such injunction, and on the thirtieth of December, 1847, it was affirmed in the supreme court. That notwithstanding said corporation was thus notified by said bill that it had no power under its charter to deal in exchange, receive money on deposit, and in a word, to perform the functions of a bank as before stated, it continued the same business it had done before the institution of said suit, until it finally suspended, in October, 1847. The bill charges that the stockholders were advised of the nature and character of the business done by said corporation, as before recited; and states various facts and circumstances from which it is insisted such knowledge on the part of the stockholders may be inferred.

The bill then proceeds to state the nature of the claims and demands of the complainant against the Merchants' Insurance and Trust Company at Nashville and its stockholders. These claims and demands originated in contracts and agreements made and entered into by Caleb C. Norvell, as agent at Philadelphia of the Merchants' Insurance and Trust Company of Nashville, and William H. Vermilye, as agent and cashier at the transfer office, in the city of New York, of the Ohio Life Insurance and Trust Company. The powers and authority conferred on said Norvell as such agent, are contained and set forth in the power of attorney exhibited in the bill; it is dated the eighteenth of May, 1846, and was to take effect in the discretion of said Norvell on the first of July, 1846; it was so authenticated as to be admitted to record at Philadelphia, under the registry laws of Pennsylvania, and was accordingly recorded there, and a copy of it placed at New York for the inspection of said Vermilye.

It appoints said Norvell the true and lawful agent of said Merchants' Insurance and Trust Company, and "empowers him in the most ample sense and manner for said company, and in their name to do and perform all acts of every description whatsoever, which in his judgment or discretion he may deem necessary, convenient, or useful for the transaction of their business; the said company hereby ratifying and confirming the same, and the signature and indorsements of said C. C. Norvell, agent, to all instruments of writing whatsoever,

and his negotiations and contracts are hereby declared to be as binding upon the said Merchants' Insurance and Trust Company at Nashville, as though the same had been made by the board of president and directors, signed by their president and secretary, and sealed with their common seal at their office in Nashville;" with power also to appoint a subagent and assistant, which was accordingly done. The said Norvell assumed the said agency about the first of July, 1846, and continued in it until the suspension of said company in October, 1847, and during the same period, and before that time, George McGregor was agent of said company at New Orleans.

It became desirable to said company in the course of its business, at Nashville, New Orleans, and Philadelphia, of the character and description before mentioned, to open an account with the complainant at its transfer office in New York, and to get it to perform certain agencies connected with the collection and disbursement of funds at that place and in Europe. An agreement to effect these and other objects connected therewith was made on the seventeenth of October, 1846, by C. C. Norvell, as agent of the Merchants' Insurance and Trust Company, and William M. Vermilye, as agent of the Ohio Life Insurance and Trust Company; and this agreement and arrangement continued to be acted upon by the parties until the suspension of the former company, which occurred as before stated, in October, 1847.

In compliance with this arrangement, said William M. Vermilye, as agent and cashier of complainant, at said transfer office in New York opened a business account with and in the name of said Merchants' Insurance and Trust Company at Nashville, placed the funds and assets of said company which came to his hands to their credit, and held the same subject to the checks or drafts of George Crockett, president of said company at Nashville, George McGregor, agent at New Orleans, and C. C. Norvell, agent at Philadelphia; the checks or drafts not to exceed "sixty days sight," or "seventy days date." The whole account was to be under the superintendence of said C. C. Norvell, and "to be made good to the Ohio company as to payments, and safe as to acceptances," by the agency at Philadelphia; the payments to be reimbursed by cash and the acceptances secured with good paper, or other collaterals equal thereto. A specific compensation was to be made to the said Ohio company for its services and responsibilities for and on account of said Tennessee company.

Funds and drafts, bills and other securities for funds, were placed in the hands of said Vermilye, as agent of the complainant, by said Merchants' Insurance and Trust Company, through its operations mainly at New Orleans; the proceeds to be placed to credit of said account.

In some instances, bills on England were sent by Norvell to his own correspondent in England, with directions to collect them and hold proceeds subject to Vermilye's order. The following letter from Norvell to Vermilye, dated November 25, 1846, will explain the nature of some of the European transactions, which grew out of said arrangement: "I herewith hand you a letter addressed to our London correspondents, Messrs. A. A. Gower, Nephews, & Co., inclosing for your use and credit bills sterling, five thousand nine hundred and forty-three pounds thirteen shillings and twopence, which we propose to debit you on foreign-exchange account par value, say twenty-six thousand four hundred and thirteen dollars and sixty-two cents, subject to such premium as you may realize on your drafts on Messrs. Gowers, less your commission, one fourth per cent. Should we hereafter send you drawn bills on London, with a request to indorse and sell the same in New York, we shall expect to pay you some commission, but free of brokerage. Our subsequent remittances to Gower & Co., for your use and credit, will be made under cover to you, that you may debit them with such bill from my letter. You will observe from my general instructions to them that I have requested them to protect my indorsement in case of default. In other words, to charge my account, and not yours, with any bill that may go wrong. You will also consider me as guaranteeing to your company, in behalf of my own, the solvency and promptness of our London correspondents."

Such is the general character of the operations by which the Merchants' Insurance and Trust Company provided credit and funds in the hands of William M. Vermilye, agent and cashier at said transfer office in New York.

Now, said company availed itself very largely of this arrangement at its office in Nashville, at its agency in New Orleans, and at its agency in Philadelphia, by checking and drawing drafts and bills upon said funds and credit. The transactions of the parties growing out of said arrangement were numerous, complicated, and in some instances for large amounts; and involve an account of mutual credits and debits. A great part of the account relates to the operations of the parties in sterling and other European bills, derived mostly

through the defendant's agency at New Orleans, and placed by said Norvell in the hands of his London correspondents, Gower & Co., as security for advances made and to be made by said William M. Vermilye, cashier as aforesaid, and for his acceptances; and in order to raise a fund in the hands of Gower & Co., on which said Vermilye might draw, to reimburse him on said general account.

Sometime in the year 1847, the said Gower & Co., at London, became bankrupt, and were declared bankrupts by course of legal proceeding in England, and their assets yielded to their creditors a dividend of only one shilling and sixpence in the pound sterling. On this account, very heavy losses were sustained by said Merchants' Insurance and Trust Company, and large liabilities were incurred and payments made by the Ohio company, for and on behalf of said Merchants' Insurance and Trust Company, in transactions growing out of said arrangement, for which the latter company is liable in account to the former, and on these and other accounts set forth and stated in the bill, and all growing out of said arrangement, the Ohio Life Insurance and Trust Company claims of the Merchants' Insurance and Trust Company the sum of four hundred and forty-seven thousand two hundred and twenty-seven dollars and thirty-three cents.

On the sixth of January, 1848, the president and directors of the Merchants' Insurance and Trust Company executed a deed of assignment to Adrian V. S. Lindsley and Daniel B. Turner, upon the trusts and specifications in said deed mentioned, of all the property and effects, money, accounts, and choses in action, of every description, of said corporation; schedules of which were annexed to said deed. From these schedules, it appears that the nominal assets of said corporation amount to three hundred and eighty-six thousand seven hundred and ten dollars and fourteen cents, and the liabilities to four hundred and ten thousand eight hundred and twenty-three dollars and twenty-five cents, showing an excess of liabilities over the nominal assets to the amount of twenty-four thousand one hundred and thirteen dollars and eleven cents. The account with the Ohio company is not taken into the above estimate, nor is it expressly or in fact provided for in said deed, as it is very evident that the preferred claims will more than exhaust the entire assets named in the assignment. The capital stock is not named in the assignment or in the schedule of assets, nor does it appear to have been preserved in any permanent or specific form; but on the contrary, the

bill charges that so far as it had been paid in, it had been refunded to the stockholders out of the profits and dividends of the corporation, in the course of its said operations.

The bill makes the Merchants' Insurance and Trust Company, in its corporate character, and the persons designated as the stockholders of said corporation, and the trustees named in the deed of assignment, defendants; and it prays, first, for an account, and that the corporation and the persons designated as its stockholders, be compelled to pay plaintiff the sum which may appear to be due on taking the account; or if those persons should not be deemed liable on the grounds assumed in the bill, that is, liable in their private capacity on the grounds of fraud and partnership, then it prays that said stockholders be held liable to the extent of their capital stock; and further, that the deed of assignment be declared fraudulent and void, or if not void for fraud, that nothing passed thereby, and that the assets of the company be brought into the account for the benefit of creditors.

At the hearing of the case, several questions were raised and very ably argued. In proceeding to dispose of them, we shall inquire: 1. Is the complainant repelled from a court of equity by any illegality in the transaction stated in the bill, and its connection therewith? 2. If not so repelled, to what extent and in what manner are the defendants, or any of them, liable? 3. Is the bill multifarious?

1. As to the question of illegality: we will first ascertain the nature of the rule relied upon, with its modifications and exceptions, and then consider its application to the present case; for in the views we take of it, the case turns upon one of the modifications of the rule.

The general rule is, that no action or suit can be maintained, either at law or in equity, upon any contract or agreement made in violation of law; and such contract or agreement is held to be void, because of the illegality. If the contract stand opposed to the common law or statute law, it is equally void, *ab initio*, in the one case as in the other, and no action or suit will lie to enforce it. This rule, being well grounded in reason and authority, is steadily upheld by the courts both in England and the United States, with proper and reasonable exceptions, which we shall presently notice. It matters not in what manner the illegality shall appear, whether on the face of the contract, or by the plea of the defendant; nor what may be the nature or form of the contract, its effect is to annul and dissolve the contract, so far as relates to any remedy upon it,

and to leave the parties in the condition in which they placed themselves: 1 Comyn on Con. 302; 2 Kent's Com., lect. 39, p. 466; Pothier on Obl., App.; *Collins v. Blantern*, 2 Wils. 347; S. C., 1 Smith's Lead. Cas. 609, and note; *Bartle v. Nutt*, 4 Pet. 184; *Griswold v. Waddington*, 16 Johns. 487; *Hals v. Henderson*, 4 Humph. 200.

But the rule goes no further than merely to deny to the parties any remedy upon their illegal contracts; it relates to the remedy alone; and therefore a sale of property upon an illegal consideration, or a fraudulent consideration, has the effect to pass the title to the vendor. But the parties to such contracts are left without legal protection or remedy, as against each other, either to enforce the contract, or for a breach of any of its stipulations: *Worcester v. Eaton*, 11 Mass. 375; *Yerger v. Rains*, 4 Humph. 259.

A contract is illegal at common law if it violate good morals, or is opposed to public policy, or is infected with fraud; and it is also illegal, if it violate the provisions of a public statute. Mr. Kent, in his Commentaries, says: "Contracts are illegal when founded on a consideration *contra bonos mores*, or one against the principles of sound policy, or founded in fraud, or in contravention of the positive provisions of some statute law:" 2 Kent's Com., lect. 39, p. 466.

Now as to contracts which contravene the provisions of a statute, the objection of illegality is equally fatal, whether the prohibitions of the statute be expressed or implied, as where a statute does not in express terms prohibit a thing to be done, but only imposes a penalty on the person doing it; any contract which contravenes this implied prohibition will be held illegal: *Bartlett v. Vinor*, Carth. 252; *De Begnis v. Armistead*, 10 Bing. 110; Smith on Con. 151; 1 Smith's Lead. Cas. 168, note.

Whether the contract be *malum prohibitum* or *malum in se*, seems not to be material, as in either case the courts will refuse to enforce it, and upon this reasoning, "that there can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal." So in *Collins v. Blantern*, *supra*, Wilmot, C. J., says: "I think there is no difference between things made void by act of parliament and things void by the common law. Statute law and common law both originally flowed from the same fountain, the legislature. I am not for giving any preference to either, but if to either, I should be for giving it to the common law:" See also *Bank of United States v. Owens*, 2 Pet. 538; *Watts v. Brooks*, 3 Ves. jun. 612; *Aubert v. Maze*, 2 Bos. & Pul. 371.

But where the contract is not sought to be enforced, but is repudiated and disaffirmed, a different rule may and often does apply; and the party will, in many circumstances, be entitled to the remedial action of the courts to recover back the money or consideration paid, or to cancel securities given upon illegal and void contracts. It is not an easy matter, in view of conflicting authorities, to state in distinct propositions the various cases in which the party shall be held entitled or not entitled to this relief.

Mr. Story, in his Equity Jurisprudence, section 298, says, "that where agreements or other transactions are repudiated on account of their being against public policy, the circumstance that the relief is asked by a party who is *particeps criminis*, is not in equity material. The reason is, that the public interest requires that relief should be given, and it is given to the public through the party. And in these cases relief will be granted, not only by setting aside the agreement or other transaction, but, in many cases, by ordering a repayment of the money paid under it."

Again, in section 300 of the same work, Mr. Story further says: "That where both parties are *in delicto*, concurring in an illegal act, it does not always follow that they stand *in pari delicto*, for there may be, and often are, very different degrees in their guilt. One party may act under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age; so that his guilt may be far less in degree than that of his associate in the offense."

In 2 Comyn on Contracts, 109, a distinction is taken in this respect between contracts executed and executory, but it is admitted by the author that the distinction is not of general application, but is itself subject to exceptions.

Without going further into detail, we think it may be deduced from the premises and the authorities cited that if the contract involve moral turpitude, the parties to it are to be held and deemed as *in pari delicto*, and the courts will not undertake to define and distinguish their relative guilt. In such case, therefore, it is a general rule that no relief will be granted, whether the contract be executed or executory; if it be executory, no action will lie to enforce it; if executed, that is, if money be paid upon it, no action or suit will lie to reclaim it: *Worcester v. Eaton*, 11 Mass. 375.

In the next place, if the contract be in violation of public policy, as declared either by the common law or statute law,

then the courts are mainly governed by the consideration of what is due to that public policy, and what will be most likely to promote it. In such case, if the parties be *in pari delicto*, and the contract be executed, they are left without remedy; if it be executed, and the parties be not *in pari delicto*, relief will in general be granted in disaffirmance of the contract, and the claims to justice, such as they are, of the less guilty party, will be reconciled with the claims of public policy; if it be executory, it is the general rule to grant relief against it; and in a court of equity to cancel any notes, bonds, or other agreements founded upon such illegal contract, and to order any money or other thing paid upon it to be refunded; and in a court of law, the party has remedy to recover back any money paid upon such illegal executory contract, proceeding upon the ground of its disaffirmance. And this relief against executory contracts, made in violation of public policy, is granted or allowed, without regard to the circumstance that the parties are or are not *in pari delicto*: *Holman v. Johnson*, 1 Cowp. 341; *Howson v. Hancock*, 8 T. R. 576; *Vandyck v. Hewitt*, 1 East, 96; *Browning v. Morris*, 1 Cowp. 792; *Jaques v. Withy & Reid*, 1 H. Black. 65; *Aubert v. Walsh*, 3 Taunt. 282; *Utica Ins. Co. v. Kip*, 8 Cow. 20; *Lowry v. Bourdieu*, 2 Doug. 470; *Law v. Law*, 3 P. Wms. 392; *Morris v. McCulloch*, 2 Ambl. 433; *St. John v. St. John*, 11 Ves. 535; *Musson v. Fales*, 16 Mass. 333; *Greenwood v. Curtis*, 6 Id. 380 [4 Am. Dec. 145]; *Arden v. Patterson*, 5 Johns. Ch. 49.

In *St. John v. St. John*, 11 Ves. 533, Eldon, the lord chancellor, says: "The authorities go to this, that where the transaction is against policy, it is no objection that the plaintiff himself was a party in that transaction, which is illegal." In *Shirley v. Ferrers*, cited Id. 535, in the court of exchequer, the case of a marriage-brochage bond, the plaintiff was a party to the transaction, *particeps criminis*, but the court held that where the relief is upon the policy of the law, that is not material; the public interest requires that the relief should be given, and it is given to the public through the party.

Now, in what circumstances may it be said that a party to an illegal transaction is *in pari delicto*? This question will be best resolved by referring to some of the cases. In *Browning v. Morris*, 2 Cowp. 792, Lord Mansfield says: "Where contracts or transactions are prohibited by positive statutes for the sake of protecting one set of men from another set of men, the one from their situation or condition being liable to be oppressed or imposed upon by the other, there the parties are

not *in pari delicto*; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract." In conformity to this principle, it has been held that premiums paid for insuring lottery tickets, contrary to the statute, 17 Geo. III., c. 46, may be recovered back: *Jaques v. Golightly*, 2 W. Black. 1073. In this case, the court say: "The statute is made to protect the ignorant and deluded multitude, who in hope of gain and prizes, and not conversant in calculations, are drawn in by the office keepers." So if a creditor take money as a consideration for signing a bankrupt's certificate, contrary to the statute of 5 Geo. II., c. 24, sec. 17, the bankrupt, after having obtained his certificate, may recover it back: *Smith v. Bromley*, 2 Doug. 696, note to *Jones v. Barkley*. So if usurious interest be paid, it may, on the same principle, be recovered. Now, in these several cases, it will be observed that the money was paid on agreements made in violation of public statutes; yet as they were made to protect one class of persons against another class, and as there was an inequality in the condition of the parties, in reference to the transactions, it was held that, although *in delicto*, they were not *in pari delicto*. *Osborne v. Williams*, 18 Ves. 382, was decided upon the same principle. The agreement in that case was held to be illegal, as being a fraud upon the post-office. Sir William Grant, in delivering his judgment, observes that "courts" both of law and equity, have held that two parties may concur in an illegal act, without being deemed to be in all respects *in pari delicto*.

In *Goldsmith v. Bruning*, 1 Eq. Cas. Abr. 89, a marriage-brocage case, the party obtaining money by the sale of her influence must have been considered as more criminal than the purchaser; for she was decreed, first at the rolls, and afterwards upon appeal, to refund the sum which she had received. The case of *White v. Franklin Bank*, 22 Pick. 181, was also decided on the same principle. That case was on a contract by the bank to pay money at a future day certain, in contravention of the express provisions of a public statute. The court say: "The prohibition is particularly leveled against the bank, and not against any person dealing with it. In the words of Lord Mansfield: the statute itself, by the distinction it makes, has marked the criminal. The plaintiff is subject to no penalty, but the defendants are liable for the violation of the statute, to a forfeiture of their charter. To decide that this action cannot be maintained would be to secure to the

defendants the fruits of an illegal transaction, and would operate as a temptation to all banks to violate the statute by taking advantage of the unwary, and of those who have no actual knowledge of the existence of the prohibition of the statute, and who may deal with a bank without any suspicion of the illegality of the transaction on the part of the bank." This case is referred to and approved in *Atlas Bank v. Nahant Bank*, 3 Met. 585.

In view of the authorities, therefore, we assume the principle to be that if a party, acting under circumstances of necessity, or hardship, or imposition, or great inequality of condition, enter into a contract in violation of a rule of public policy, intended for his advantage and protection, it is to be considered that although he is *in delicto*, he is not *in pari delicto*, and in such case he will be entitled to recover back what he may have paid to the other party, or he may have his contract canceled, as the case may require: *Hunter v. Agee*, 5 Humph. 57; *Coventry v. Barton*, 17 Johns. 142 [8 Am. Dec. 376]; *Musson v. Fales*, 16 Mass. 332; Smith on Con. 190.

As to the extent and limits of the rule, which denies any remedy upon illegal contracts, it is material to observe that it does not apply, unless the contract grow immediately out of and be connected with the illegal act: *Armstrong v. Toler*, 6 Pet. Cond. R. 802. Accordingly, it was held in *Faikney v. Reynous*, 4 Burr. 2069, that if one person pay the debt of another at his request, an action may be sustained to recover the money, though the original contract was unlawful, and that fact known to the plaintiff when he discharged it for the defendant. So in *Hodgson v. Temple*, 5 Taunt. 181, it was held that the mere selling of goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment, but to effect that, it is necessary that the vendor should be a sharer in the illegal transaction: See also *Holman v. Johnson*, 1 Cowp. 341; *Greenwood v. Curtis*, 6 Mass. 380 [4 Am. Dec. 145]; Story's Conf. L., sec. 249; and *Craig v. State*, 4 Pet. 410.

In *Wetherell v. Jones*, 3 Barn. & Adol. 221, a distinction is taken between illegal contracts and another class in which the contract itself does not violate the statute, but some incidental illegality occurs in carrying it into effect. In these latter cases, the contract is good, and may be made the subject of an action, notwithstanding the breach of the law, which has occurred in carrying it into effect: Smith on Con. 151.

In the next place, we shall ascertain the effect of the prin-

ciples here stated, upon the case now before us; but in so doing, it will be necessary first to consider the rights, powers, and restrictions which properly appertain to the corporation in question. It is chartered by the act of 1840, chapter 60, entitled, "An act to extend the act of 1837-8, chapter 206;" and the first section provides "that the provisions of the twenty-first section of the aforesaid act, equalizing the rights and privileges of the insurance companies of this state, be extended to a body politic and corporate, hereby created by the name and style of the 'Merchants' Insurance and Trust Company of Nashville.'"

The act referred to is the charter of the Knoxville Marine Fire Insurance and Life and Trust Company, and its twenty-first section is as follows: "That all rights and privileges granted by this act which have not heretofore been granted to any of the existing insurance companies of this state, shall be and the same are hereby granted to them, and that any right or privilege heretofore granted to any existing insurance office in this state is hereby extended to the corporation herein created, so as to place all institutions of the same kind on the same footing."

It is this section that confers upon the Nashville company their corporate powers, rights, and privileges, and these are to be found in the charter of the Knoxville company.

In construing this statute, it is material to observe its obvious and evident intention to place all insurance companies on a footing of equality; and though "rights and privileges" are the words employed in the former part of the section, yet in order to give effect to the intention, it must be understood as implying responsibilities, obligations, and duties also, otherwise the insurance companies would not be, as they were intended to be, on a footing of equality.

The rights and privileges of the Knoxville company are granted upon certain terms and conditions, obligatory upon the company and material to the public interest, without which it is to be presumed that no such grant would have been made. Now, it seems to us a technical and unreasonable construction of the statute to say that it intended to confer upon the Nashville company similar rights and franchises, and not to impose similar obligations and duties, when it is the declared intention to place the companies on a footing of perfect equality. We are of opinion that the Nashville company, in receiving the rights and franchises, incurred also the obligations and duties stated in the charter of the Knoxville company.

We shall refer to those rights and obligations so far only as may be material to the case before us. The corporation has power: 1. To make insurances without limit or restriction; 2. To accept and execute all such trusts of every description as may be committed to it by any persons whatsoever, or may be transferred to it; 3. To hold real estate and sell the same so far as may be necessary to protect its rights and interests; 4. To invest any part of its capital stock, money, funds, or other property, in any stocks in the United States, and the same to sell and reinvest at pleasure, or it may loan the same on real or personal security, as may be deemed best; 5. To establish agencies in Tennessee or elsewhere; and 6. A general power "to do and perform all other things necessary to promote these objects."

At the same time, it incurs the following obligations and restrictions: 1. The individual property, both real and personal, of every stockholder in said institution, shall be held and bound for the payment of the debts of said corporation to the full amount of his or her stock in said corporation; 2. It shall not be authorized to issue "bills of credit," or "exercise banking privileges," or put in circulation any note, draft, check, or change ticket, intended, or the tendency of which will be, to circulate as change or currency; 3. It shall not make or effect any insurance, until the whole of its stock shall have been taken and secured, and twenty-five thousand dollars of it paid in.

Now, it is objected on the part of the defendants that the complainant has no right to the aid of the court for relief, because of the illegality of the transaction stated in the bill. The illegality, it is said, consists in this, that the Merchants' Insurance and Trust Company of Nashville, contrary to its charter, and against its express prohibitions, was engaged in the business and pursuit of banking, by borrowing money, receiving deposits, drawing drafts and checks, and dealing in exchange as a business and for profit. That whilst engaged in this business said corporation, by its agent, entered into the agreement and had the transactions stated with the complainant, out of which its claims originate. That these transactions were, in themselves, a dealing in exchange in contravention of the provisions of the charter of the Nashville company. And, therefore, because the claims of the complainant originate in these illegal transactions, it will be repelled from the court, and no relief be granted.

We have before stated the principles and distinctions deemed

applicable to this subject; it only remains very briefly to apply them.

But in the first place, it is material to ascertain the rights and powers which the corporation may lawfully exercise. Its franchise is a grant of general and plenary powers as an insurance and trust company; it cannot be extended by construction to any other object or business, but is confined strictly to the terms of the grant. As to the mode and means by which this franchise shall be used and enjoyed, that is entirely a different matter, and it depends upon the charter also, so far as it contains any provisions on the subject, and if none, or where it may be silent, then upon the general law applicable to corporations and natural persons. If the charter prescribe a given mode or means, by which any of the rights it confers upon the corporation shall be used and enjoyed, then it shall in general be confined to the mode or means specified, to the exclusion of any other, though ever so desirable or convenient. The reason is, that it is the creature of its charter, and must look to it for its faculties and functions. Another reason is, that its owners, the persons for whom it acts, are in the possession of an exclusive privilege and franchise denied to others, and therefore, it is not reasonable that it should be extended to the prejudice of others by what might be called a liberal construction, but that it be confined strictly within the limits of the grant. We may further observe that if the doctrine of constructive franchises were admitted in corporate law, it would be a difficult matter to define their limits, or to check encroachments upon rights and privileges, that should be enjoyed in common by others. The rule of strict construction may be considered the settled doctrine of both the English and American cases.

The charter in question grants to the corporation plenary powers as an insurance and trust company; this is its franchise, and it has no other.

It cannot exercise the right of banking, because that right is not included in the grant as one of its franchises, and this disability exists without reference to the prohibitions contained in the charter. Then, as to the mode and means by which the conceded franchise may be used and enjoyed, and as to the mode and means by which the incidental right to use the stock before stated may also be used and enjoyed, we are first to look to the charter, and if it contain any special provisions in these respects, they must be pursued, or if it contain any special prohibitions, they must be obeyed; but in the absence of either,

we must look to the general law. The charter, after conferring the general franchise, provides that the corporation shall have power to establish agencies in Tennessee or elsewhere, and power "to do and perform all other things necessary to promote the objects" of the grant; it is silent as to any other mode or means by which the rights of the corporation shall be used or enjoyed, and leaving this matter to the corporation, expressly grants to it indefinite powers to do all other things necessary to promote the objects of the incorporation. A restriction, however, is imposed to this extent, that it shall not "exercise banking privileges," or "issue bills of credit," or put in circulation any note, draft, check, or change ticket, intended, or the tendency of which will be, to "circulate as change or currency." Now it is evident that these prohibitions resolve themselves simply into one, and that is, that the corporation shall not exercise the powers and functions of banking. It shall not issue bills of credit, or put in circulation other paper, intended, or the tendency of which will be, to circulate as change or currency, that is, it shall "not exercise banking privileges." It does not deny to the corporation the right to be a party, as maker or holder, to any note, draft, or check, but only that it shall not issue such paper or bills of credit, or change tickets, with the intention that it shall circulate as currency. In other words, the prohibitions are directed, not against particular acts, but against a business or pursuit.

We think it very clear that the corporation, as an insurance and trust company, had the right to borrow money, receive deposits, draw or purchase drafts or checks in its proper business, as incidental powers necessary to the proper use and enjoyment of its franchise, and that any such transaction would be valid and obligatory upon it. There are no restrictions in the charter, denying it the right to do any of these acts; on the contrary, it expressly confers the power to do any act or thing necessary to promote the objects of the charter.

In Angell & Ames on Corporations, c. 8, sec. 12, it is said that "in general an express authority is not indispensable to confer upon a corporation the right to become drawer, indorser, or acceptor of a bill of exchange, or to become a party to any other negotiable paper." It is sufficient, if it be implied, as the usual and proper means, to accomplish the purposes of the charter: Story on Bills, sec. 79; 2 Kent's Com., lect. 38, p. 239; *Broughton v. Manchester Water Works Co.*, 3 Barn. & Ald. 1.

In the *Union Bank v. Jacobs*, 6 Humph. 525, Turley, J., in delivering an able opinion on this subject, says that "a cor-

poration is, in the estimation of law, a body created for special purposes, and there is no good reason why it should not, in the execution of these purposes, resort to any means that would be necessary and proper for an individual in executing the same, unless it be prohibited by the terms of its charter, or some public law, from so doing." In further illustration of this subject, we shall merely refer to Angell & Ames on Corp. 92; *Chester Glass Co. v. Dewey*, 16 Mass. 102 [8 Am. Dec. 128]; *Baird v. Bank of Washington*, 11 Serg. & R. 418.

Now, by what agency or means could the proper objects of the corporation be affected; its funds be secured, remitted, or transferred; its trusts, however numerous or various, be executed; its investments be made in stocks, or otherwise, as allowed by the charter; and its business and interests as an insurance and trust company be managed and conducted, at different and often at distant places, if we deny to it the rights and powers before stated? We see no reason why it should not employ the usual and appropriate means which a natural person might employ to effect any of these objects. And the right to draw checks and drafts creates a necessity to provide agencies, procure acceptances, and provide ways and means for the honor of its paper. Without pursuing this part of the subject further, it seems to us that so far as relates to the question of competency and power, the corporation had the competency, power, and capacity to be a party to any of the contracts and agreements stated in the bill. That is, we do not think that those transactions should be held as void for the want of any competency in the corporation, as one of the parties, to enter into them, as in the case of a minor or *feme covert*, whose contract is to be considered as void for want of competent power to make it. But, nevertheless, those transactions remain subject to the other question, the question of illegality, in the same manner as if they had been the acts of a natural person, subject to similar restrictions as those imposed upon the corporation.

It is agreed that the transactions stated in the bill are illegal, because they contravene the restrictions contained in the charter of the Nashville company, and also the restrictions and policy of our restraining law of 1827, chapter 85. Under this law (1827), no person has the right, unless indeed he have a grant from the state, to establish any banking institution or to issue any notes, bills, or other paper for such purpose.

The business of banking may consist, as is well known, in receiving deposits, in loaning and borrowing money, and in

buying and selling exchange, which is usually effected by drafts, checks, and other paper; that is, banking, when viewed in detail, may consist in a series and succession of acts of this character, intended to be pursued and continued as a business and occupation. It was a common-law right, which any person might lawfully exercise, until it was restrained by the act of 1827, upon considerations of high public policy and interest: *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 377. But it is to be considered that the prohibition goes to the business and occupation of banking, and not to any one or more of the acts in detail, before stated; and therefore any person may, in many transactions of like character, borrow or loan money, and be a depository of money, buy or sell exchange, and be the drawer or holder of any kind of commercial paper, as notes, bills, and drafts, provided that it be not in the business and pursuit of banking.

The same may be said of the corporation in question; it has the corporate capacity, as we have seen, to do any of the acts before enumerated, as a natural person has capacity to do the same, and they will be held alike obligatory upon each. The question under the law is, whether the corporation or person is engaged in the business of banking, or in other words, whether the acts in question taken together do constitute the business and pursuit of banking. For the prohibition goes not to the acts in detail, but to the business or pursuit to which they have reference. We have before considered the nature and extent of the restrictions, in this respect, contained in the charter, and it will be seen that they are in substance and effect the same as those contained in the general law of 1827, and founded upon the same considerations of public policy and interest.

The law of 1827 establishes a local policy for the state, and can have no inherent force or effect beyond its limits; it does not therefore apply to or in any manner affect the present transaction, because the contracts stated in the bill were made, and to be executed, in a foreign state, that is, in the state of New York. But as to the restrictions incorporated in the charter of the Nashville company, they have no reference to any limits or locality, but restrain the action of the corporation, wherever it may, by comity, be permitted to exercise its powers and functions. These restrictions do therefore apply with full force to the transactions stated in the bill.

There is no question but that it was perfectly competent for the corporation to exercise all or any of its powers, in the state

of New York, or other foreign state, provided that it did not violate the public law or policy of such state. A corporation may be said to have its residence in the state where it is created, and it cannot migrate from it; because "it exists only in contemplation of law and by force of law, and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence." But its existence in the state where it was created and resides is recognized in foreign states, and like a natural person, it may by its agents make any contract or do any act in a foreign state, without the scope of its limited powers, which is not prohibited by the foreign state. This is a well-settled principle, founded in the comity of states: *Bank of Augusta v. Earle*, 13 Pet. 521.

Now, as to the character of these contracts and dealings between Vermilye and Norvell, the agents of the two corporations, construing the charter as we do, and as it was construed by this court on a former occasion, there can be no question but that they were in contravention of the restrictions contained in the charter of the Nashville company, and were an abuse and perversion of its powers to purposes not intended by the act of incorporation. It was a dealing in exchange for profit, as a business and occupation.

It is true that Vermilye had no actual knowledge of the corporate restrictions referred to, and that he acted upon and acceded to the propositions of Norvell in full faith and confidence that they were authorized, legal, and proper, and that the engagements he had undertaken to perform for Norvell were legitimate and proper.

But taking it for granted that the law imputes the notice of these restrictions, how, then, will stand the case in reference to the question of illegality? The plaintiff could not be involved in it, unless it further appear that its agent had actual notice that defendant was dealing in exchange as a business and occupation, and that the acts and things that Norvell, the agent, engaged him to do were connected with and in the performance of that illegal business.

If Vermilye had such knowledge, it would follow that, in acceding to Norvell's propositions, and undertaking to perform the offices and duties that he did perform, he concurred with Norvell in a breach of the restrictions contained in the charter of the Nashville company.

This concurrence places him certainly at fault, but in our judgment not by any means an equal fault, *in pari delicto*, with the other party. Norvell was the principal offender, and the

corporation, ratified and approved his acts. The prohibition was pointed especially at the corporation, was intended to limit and restrain its action, and to protect persons having any transactions with it against fraud, imposition, or other deceitful practice. It was intended likewise to guard and protect the public interest against the very injurious consequences that must necessarily result from irresponsible banking, and a doubtful and spurious circulating medium.

Upon these grounds, therefore, and in view of the principles and cases before referred to, which we need not repeat, we think it very apparent that the complainant was not *in pari delicto* with the defendant in the transactions stated in the bill.

We may further observe that, ordinarily, there is great inequality in the condition of parties situated as these were; for, as a matter of fact, no one except the agents of the corporation, as it seems to us, could be well advised of the nature and character of its business, and whether a given transaction was or was not in violation and fraud of the restrictions contained in the charter.

It is very true that every one must be held to a knowledge of the law. But that is not the question. It is, whether, the law being known or the prohibition being known, a given state of facts exists; whether, for instance, the corporation is in the exercise of prohibited powers, and whether a given transaction is under the ban of such prohibition. We cannot doubt but that, in this respect, the parties do occupy very different and unequal ground.

We have seen that, in general, where there is great inequality in the circumstances and condition of the parties to an illegal contract, which we conceive to be the present case, the principle is, that they are not to be held as *in pari delicto*.

We are of opinion, therefore, that the complainant is not repelled, by reason of the illegality relied upon in the defense; but is entitled to relief; and that, in granting it, the court will promote both the claims of private justice and the ends of public policy.

It is to be observed, however, that the relief is against the contract, and not upon the contract; for we have seen that in the nature of things, the law cannot enforce an illegal contract, although the parties be not *in pari delicto*. But it is consistent with itself, that the law shall annul such contract, and place the parties in all respects *in statu quo*.

We shall briefly dispose of the remaining questions in the case.

2. And in the next place, in what manner and to what extent are the defendants liable?

It is insisted by complainant's counsel that the persons who are the stockholders in the Nashville company are liable, not as corporators, but in their individual and natural capacity, for the demands stated in the bill.

In support of this position, it is assumed that Norvell was their agent, and that in said transactions with the complainant he perpetrated a fraud, for which his principals, said stockholders, are personally liable; and it is also assumed that the stockholders are liable on the ground of partnership.

Now, we have seen that it was the corporation, and not the persons who were its stockholders, that executed the power of attorney to Norvell, and that he professed to act under that power for the corporation, and not for the persons who were the owners of its stock. But it is argued that the corporation had no such power or authority under its charter as Norvell assumed to exercise, and for want of competency, was not bound by his acts; that the persons acting as the directory of the corporation were, in legal effect, the agents of the stockholders in their private capacity, and as such, ratified and confirmed the acts of said agent; that the stockholders received whatever advantage there was accruing from the acts of said agent; and that, as the corporation was not bound and could not be bound thereby, for want of any inherent power to enter into those transactions, either by itself or its agent, it follows that the stockholders, in their private capacity, must be regarded as the principal of said agent, and be bound by his acts. For the same reason, it is likewise insisted that as the stockholders were not acting in conformity to or under the protection of the charter, their acts, in this respect, must be held obligatory on them as natural persons associated on the principle of partnership.

Now, the whole argument is based upon the assumption, stated in the bill, that the contracts made by Norvell in the name of the corporation were not the business of the corporation proper, but of the stockholders, who thus formed an association, amounting in fact to a partnership, for the purpose of carrying on that kind of business.

We do not understand it to be assumed, nor is there anything in the case to warrant the assumption, that the persons owning the stock in said corporation did, by any voluntary act and purpose, form a partnership or association to carry on the business of exchange in the name of the corporation, as a sepa-

rate and distinct business, in addition to the proper and legitimate business of the corporation; but that, not so intending, but only intending to do a corporate business in the name of the corporation, they assumed and exercised powers not conferred by the charter, as to which, from legal necessity, they are liable, and liable as partners; because, in point of fact, Norvell professed to act as the agent of the corporation, in virtue of the power exhibited to the plaintiff's agent, who likewise understood that he was contracting with the corporation; nor did it occur to the mind of the agent of either party that the stockholders were a party to said contracts, in any sense other than as corporators. In point of form, the contracts were made with the corporation, and so in fact were they intended by the agents who negotiated them.

Now, if the legal effect correspond with the form and the original and actual intention; if the corporation, having a legal competency to make the contracts, has incurred, to the fullest extent, whatever obligation they were intended to impose, then it is evident that the whole argument, asserting the personal responsibility of the stockholders, must fall to the ground.

We have seen, in a former part of this opinion, that the corporation had power, under its charter, to borrow money, draw or purchase drafts or checks, and provide agencies for their acceptance and payment, as incidental to the proper use and enjoyment of its franchise; and in a word, that so far as relates to the question of power, the corporation had the power and capacity, as another person, to be a party to any of the contracts and agreements stated in the bill, and that it has incurred whatever obligation they were intended to impose.

Whether those contracts were made in violation of public policy, is a different question, not going to the powers inherent in the corporation, in virtue of its charter. This latter question would be alike applicable to natural persons as to this corporation, and it arises only upon an abuse of conceded powers to purposes and objects which are prohibited.

It follows, therefore, that Norvell was not the agent of the stockholders in their private and natural capacity, and that they are not, in this character, bound by his acts. But on the contrary, the corporation, as such, was the principal, and has incurred whatever responsibility properly belongs to the acts of Norvell, in the performance of his agency.

As to the liability of a corporation for the acts of its agents, that depends upon well-settled principles, applicable to the relation of principal and agent. A corporation, whether muni-

cipal or private, is liable, like a natural person, for the contracts, frauds, and torts of its agent. It must, of course, be understood that the acts of the agent which impose a liability on his principal, either *ex contractu* or *ex delicto*, must be in the performance of, or connected with, the business of the agency: *Thayer v. Boston*, 19 Pick. 513 [31 Am. Dec. 157]; *Yarborough v. Bank of England*, 16 East, 6; *Smith v. Birmingham Gas Light Company*, 1 Ad. & El. 526; *Clark v. Washington*, 12 Wheat. 40; *Baker v. Boston*, 12 Pick. 184 [22 Am. Dec. 421]; *Fowle v. Alexandria*, 3 Pet. 409.

And so, on the other hand, it may be observed that the officer or agent of a corporation is liable to the corporation for all damages occasioned by his violation of the duties and obligations he owes to his principal, whether it consists in positive misconduct, or neglect, or omissions: Angell & Ames on Corp. 251; *Robinson v. Smith*, 3 Paige, 232 [24 Am. Dec. 212]; *Charitable Corporation v. Sutton*, 2 Atk. 406.

Assuming, then, that the stockholders are not liable upon the grounds or to the extent contended for by complainant's counsel, yet we are of opinion that they, the stockholders, are liable personally to the extent of their stock.

We have seen, in construing the charter of the Merchants' Insurance and Trust Company of Nashville, that the seventh section of the charter of the Knoxville company, act 1838, c. 206, forms a component part of the charter of the former company, and that it provides "that the individual property, both real and personal, of every stockholder in said institution shall be held and bound for the payment of the debts of said corporation, to the full amount of his or her stock in said corporation." The sixth section of the same charter confers upon the corporation the right to invest its capital stock in certain other stocks, or to loan the same on real or personal security.

Now, the capital stock is a trust fund, provided and intended to be safely kept for the security and benefit of creditors of the corporation, and is subject to be used and applied only in conformity to the provisions and permissions of the charter. It is, upon general principles, the duty of the stockholders to pay in the stock, or if there be any special provisions in that respect in the charter, of course they are to be complied with. The stock subscribed and agreed to be paid becomes the property of the corporation, and its directory, who may be regarded as the trustees of the fund, have the right, and in a court of equity, at the instance of a creditor,

may be required, to enforce its payment: *Briggs v. Penniman*, 8 Cow. 396 [18 Am. Dec. 454]. As regards the interest of the stockholder in the capital stock, it is not a chattel interest, but is in the nature of a chose in action, being a mere right to demand the dividends as they become due, and at the dissolution of the corporation to demand its return, or the residue thereof, after the claims and demands of creditors shall have been first satisfied. The interest of the corporation and stockholders in this fund is to be regarded, in all respects, as subordinate to the claims and demands of creditors. They have no right to withdraw it, or in any wise to endanger, impair, or diminish it, to the prejudice of the superior claims of creditors: *Angell & Ames on Corp.*, c. 16, 17; *Kirby v. Potter*, 4 Ves. 751; *Wildman v. Wildman*, 9 Id. 177; *Brightwell v. Malory*, 10 Yerg. 196; *Wood v. Dummer*, 3 Mason, 308.

In the present case, the corporation, by its charter, was permitted to use its capital, the trust fund, in a given manner, supposed to be least hazardous to the rights of creditors, and to make it available in dividends and interest; but to compensate the risks to creditors, the charter imposes upon the stockholders the personal responsibility for the capital, to which we have alluded.

It was not the intention of the charter that the capital stock should be carried into the business of the corporation, and form a part of its general assets; because the charter prescribing a given mode in which it may be used, impliedly excludes any other, and if used in any other manner than that permitted, it would be equivalent to a withdrawal of the fund.

But the intention was that the stock should be kept separate and apart from the other funds and business of the corporation, subject only to be invested and used in the manner before stated, and be always ready in its distinctive character as stock, to meet the debts of the corporation. Nor was it the intention that creditors should be necessarily involved in any question touching the manner in which the corporation may have used the stock. The liability of the stockholders depends upon no contingency, but is perfect and absolute, whether the corporation have abused its privilege or not. The statute makes the individual property of every stockholder liable for the debts, to the extent of his stock; and this liability imposed by statute is cumulative to the liability of the stock, which is so liable, as we have seen, upon general principles.

In *Briggs v. Penniman*, in the court of errors of New York, 8 Cow. 395 [18 Am. Dec. 454], Spencer, senator, says, alluding

to the capital stock: "This, being corporate property, is a fund for the benefit of creditors, existing entirely independent of any statutory provision. Then comes the act, 1 R. L. 247, which declares that in the event of a dissolution, the stockholders at the time 'shall be liable to the extent of their respective shares of stock held in such company, and no further.' Surely, the legislature did not mean to declare that the stockholders should be liable, as they had already agreed to be liable, and as they were liable at common law. Something more was intended, and it is, to my mind, very clearly expressed that the extent of the stock held by them should be the measure of their individual liability to creditors. The statute does not refer to them in their corporate capacity, but as individual stockholders; and it declares their liability, without reference to the amount they may have paid in on their stock."

It will be further observed that the charter makes the entire property, real and personal, of the stockholder, liable; thus including everything upon which a personal responsibility could be enforced. Its effect, therefore, is to impose a personal liability upon the stockholders to the extent of their stock, and a lien upon their property, both real and personal, for its security and payment. But this liability is, in its nature, several, and limited to the amount of their stock respectively: *Brightwell v. Mallory*, 10 Yerg. 198; *Crease v. Babcock*, 10 Met. 557.

As to the effect of the deed of assignment upon the capital stock, we may observe that it is not expressly included in that assignment, and considering its distinctive nature and character, and that it could not properly form any part of the general assets of the corporation, we are of opinion that the capital stock is not in any wise included in or affected by the deed of assignment; if, indeed, it could properly be the subject of such assignment, which we are by no means prepared to admit.

3. In the last place, it is said the bill is multifarious. It makes the persons who compose the members of the corporation parties, and seeks to impose upon them a personal liability in their private capacity, and independent of the charter, to the extent of the complainant's demand. It makes the same persons parties in their corporate capacity, and seeks to enforce against them a liability as corporators, to the extent of the capital stock of the company; it makes the corporation, as such, a party, and seeks to enforce against it a liability, not as upon the contract stated in the bill, but upon the ground of fraud; it makes the trustees in the deed of assignment parties, and impeaching it for fraud, seeks to set aside the assignment,

and to subject those assets to the payment of complainant's claims. Now, the question is, whether the various subjects and parties may all be united in the same record, as one suit. And we are clearly of the opinion that they cannot.

If a bill "seek to enforce different demands against persons, liable respectively, but not as connected with each other, it is clearly multifarious:" *Per* Lord Eldon, in *Saxton v. Davis*, 18 Ves. 79; but if there be a common interest in the plaintiffs, and the defendants represent and are interested in all the different questions raised in the record, and the suit have a common object, it is not to be considered as multifarious: *Campbell v. Mackay*, 1 Myl. & Cr. 603. The interest alluded to must not be remote and consequential, but such as will be affected and concluded by the decree: Story's Eq. Pl., sec. 140, 226.

Now, as to the deed of assignment, that is one thing in which the trustees are interested, and it is their duty to defend the deed and administer the assets placed in their hands in conformity to its directions. But what interest have the trustees with the other subjects and issues sought to be litigated in the same bill? Most certainly, none whatever. The question of fraud and partnership, on which grounds an individual and personal liability is sought to be imposed upon other defendants, independent of any liability under the charter, form a separate and distinct subject, and require allegations and proof, as to which the trustees representing the assignment have no interest or connection. Nor have those persons thus sought to be made liable, upon grounds independent and distinct from the charter, any direct connection with the litigation as to the deed of assignment. The contest between the complainant and those parties is, whether they are liable upon the facts and grounds assumed in the bill; that is, upon the grounds of fraud and partnership.

This issue is not in any wise connected with the issue proposed to be made with the trustees, as to whether the deed of assignment is fraudulent as to creditors. The hypothesis that if the assets named in the deed were applied to complainant's debt, it would *pro tanto* exonerate those defendants, and that they are interested in seeing them so applied, cannot vary the case; because the question is not whether they may be exonerated by the application of another fund, but whether they are liable at all; and besides, their position as defendants does not authorize them to assume or assert any such pretended equity. As relates to the contest with these parties, would

the bill have been defective for want of parties, if the trustees and the interest they represent had been omitted? and on the other hand, would a bill impeaching the assignment for fraud, and making the corporation and trustees parties, have been defective, if those other persons named as defendants had been omitted? We think most clearly not, in either case.

We have seen that the bill seeks to subject certain defendants, upon the ground of fraud and partnership, assuming that the contract was in effect not made with the corporation, but with those defendants. This is a distinct ground, not dependent upon the relation which the defendants, as stockholders, sustain to the corporation, and it would result, if maintained, in their personal liability to the extent of complainant's demand.

But failing in this, the bill further seeks to make those same persons liable in their corporate character, to the extent of the capital stock, upon the ground that the plaintiff's demand is against the corporation, as upon a contract made with a corporation, and that the stockholders are liable for its debts to a certain extent.

Now, it seems to us, that in this respect the bill is defective; it is blending in the same record two separate and distinct cases, or an incongruous statement of the same case. For it is very evident that if the contract on which the complainant relies was made with the corporation, then the corporation is liable, and those defendants are liable in the character and to the extent before stated. Here is a simple and distinct case in itself. It is equally evident that, in such case, they would not be liable as partners.

We think it very clear that the bill is multifarious, and without extending the argument further, shall merely refer to some cases illustrative of the doctrine on this subject: *Brophy v. Jamieson*, 2 Mol. 404; *Whaley v. Dawson*, 2 Sch. & Lef. 367; *Campbell v. Mackay*, 1 Myl. & Cr. 603; *Ward v. Duke of Northumberland*, 2 Anst. 469; *Dunn v. Dunn*, 2 Sim. 330; *Salvidge v. Hyde*, 1 Jac. 151.

The bill is dismissed without prejudice.

THE PRINCIPAL CASE IS CITED in *Thornburg v. Harris*, 3 Coldw. 163, to the point that no action lies on any contract the consideration of which is either wicked in itself or prohibited by law, but if the illegality is not the consideration of the contract, and it is wholly disconnected from it, the contract is valid though the occasion for making it arose out of an illegal act; to the point that the remedy upon illegal contracts is not denied unless the contract

grow immediately out of and be connected with the illegal act, in *Jones v. Davidson*, 2 Sneed, 455; to the point that for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances, in *Wheless v. Second National Bank*, 1 Baxt. 476; and to the point that capital and debts of a banking and other moneyed corporations constitute a trust fund for the payment of creditors and stockholders, in *Marr v. Bank of West Tennessee*, 4 Coldw. 477; and the *dictum* of the principal case, that the business of banking was a common-law right, is referred to in *Hazen v. Union Bank of Tennessee*, 1 Sneed, 119.

RIGHTS OF PARTIES TO ILLEGAL OR FRAUDULENT TRANSACTIONS: See note to *Boyd v. Barclay*, 34 Am. Dec. 765, where the subject is discussed at length; *Spurgeon v. McElwain*, 27 Id. 266, and note, where prior cases in this series are referred to; *Gravier v. Carraby*, 36 Id. 608. A party *in pari delicto* cannot enforce an illegal or fraudulent contract, nor will it be revoked or rescinded when executed: *Norris v. Norris, Adm'r*, 35 Id. 138. And no action can be maintained on an illegal contract, for an action cannot spring from an agreement to do an unlawful act: *Hooker v. Vandewater*, 47 Id. 258; *Miller v. Davidson*, 44 Id. 715; *Webb v. Fulchire*, 40 Id. 419.

CONTRACT FOUNDED ON ACT PROHIBITED BY STATUTE under a penalty is void though not specially so declared: *O'Donnell v. Sweeney*, 39 Am. Dec. 336. A penalty imports prohibition: *Seidenbruder v. Charles*, 8 Id. 682; *Sharp v. Teese*, 17 Id. 479; *Mitchell v. Smith*, 2 Id. 417.

PARTY TO ILLEGAL CONTRACT, IF NOT IN PARI DELICTO, may recover against the other party: *Gray v. Roberts*, 12 Am. Dec. 383.

CONTRACT BY CORPORATION, WHICH IS FORBIDDEN BY ITS CHARTER, is VOID, and no recovery can be had on it: *Bank of Chillicothe v. Swayne et al.*, 32 Am. Dec. 707, and note, where other cases are collected.

CORPORATION HAS POWER TO BORROW MONEY as incidental to other powers expressly granted to it: *Bank of Chillicothe v. Chillicothe*, 30 Am. Dec. 185, and note 190, where the power of municipal corporations to borrow money is discussed at length.

INCIDENTAL CORPORATE POWERS.—A corporation has no rights except such as are specially granted or as are incidental or necessary to give effect to the powers thus granted: *State v. Mayor etc. of Mobile*, 30 Am. Dec. 564; *People v. Utica Ins. Co.*, 8 Id. 243; *N. Y. Fire Ins. Co. v. Ely*, 13 Id. 100. It cannot extend its franchise beyond the letter and spirit of its act of incorporation: *Leggett v. N. J. M. & B. Co.*, 23 Id. 728; *Penn. etc. Nav. Co. v. Dandredge*, 29 Id. 543. Buying and selling are necessarily incidental powers: *Banks v. Poitiaux*, 15 Id. 706; *McCartes v. Orphan Asylum Society*, 18 Id. 516.

ACTS OF AGENT MAY BIND CORPORATION, though the authority be not under seal nor in writing, and the authority to do so may be inferred from facts and circumstances: *American Insurance Co. v. Oakley*, 38 Am. Dec. 561; *Commercial Bank of New Orleans v. Newport Mfg. Co.*, 35 Id. 171, and note, where prior cases are collected.

PRESIDENT OF CORPORATION EXCEEDING HIS AUTHORITY is answerable to the corporation for any damage thereby occasioned: *American Insurance Co. v. Oakley*, 38 Am. Dec. 561.

DIRECTORS OF CORPORATION DEEMED TRUSTEES IN EQUITY: See note to *Hersey v. Veazie*, 41 Am. Dec. 368.

STOCKHOLDERS' LIABILITY FOR CORPORATE DEBTS: See note to *Freeland v. McCullough*, 43 Am. Dec. 694 et seq., where the subject is discussed at length.

MOORE v. BETTIS.

[11 HUMPHREYS, 67.]

DECLARATIONS OF AGENT ARE ADMISSIBLE when made in the performance of some act that would bind the principal. They are then part of the *res gestæ*, and are in the nature of original evidence.

FOUNDATION FOR ADMITTING IN EVIDENCE AGENT'S ADMISSIONS against principal must be laid by first proving the facts which render such admissions competent.

IMPEACHING WITNESS BY PROOF OF CONTRADICTIONARY STATEMENTS can only be done by first calling witness's attention to the alleged conversations, and asking him if he had held the particular conversation, stating the time, place, and person involved in the supposed contradiction.

THE opinion states the facts.

J. P. Swan, for the plaintiff.

J. Peck, for the defendant.

By Court, TOTTEN, J. The plaintiff recovered two judgments against defendant before a magistrate, and executions thereon were placed in the hands of H. Scroggs, a constable, on which it appears there were levies, but no sale, by order of the plaintiff. Some years after, *alias* executions were issued, and thereon they were superseded, as to part of the debt, by proceedings in the circuit court of Jefferson, where, on an issue of payment before a jury, the verdict was that the alleged payment had been made.

The defendant, in his petition, makes no point on the levy, which might otherwise be considered a satisfaction, and we are left to presume that the levy was waived by agreement of the parties. But he claims a credit for money paid to the constable, as defendant alleges to be applied to these judgments.

To prove this payment, defendant introduced Travillian and Ritchey, who testify as to a conversation between defendant and Scroggs, the constable, as to a payment and receipt therefor, made some time previously. The conversation was of a previous transaction, and it does not appear that Scroggs was then acting in his office for plaintiff, or that he was then acting as agent of plaintiff, but the contrary. Scroggs's deposition was taken, and he denies any such payment on the judgments in question. On his examination, he was not called upon to say whether he had had the conversation referred to by the other witnesses. The court gave judgment for defendant, and the plaintiff has appealed in error to this court.

It is here objected, first, that the evidence of the admissions of Scroggs, the constable, was incompetent; second, that there

is a decided and evident preponderance of proof against the alleged payment.

As to the first question, the rule is, that "where the acts of the agent will bind the principal, then the representations, declarations, and admissions, respecting the subject-matter, will also bind him, if made at the same time, and constituting part of the *res gestæ*." They are verbal facts, in the nature of original, and not hearsay, evidence, and may be proved by another as well as by the agent himself. If, therefore, the act of the agent is admissible in evidence, what he said in relation to it, while performing the act, is likewise admissible.

Such being the rule, it necessarily follows that after the agency has ceased, or after the transaction in which the person had the right to act and did act as agent, the admissions of the agent are not to be taken as the admissions of the principal, but as hearsay merely.

If a party desire to prove the admissions of a supposed agent against a principal, it is incumbent on him, first, to prove the facts which render such admissions competent, according to the rule before stated, otherwise the evidence should be respected: See 1 Greenl. Ev., sec. 113; Story on Agency, sec. 134; *Garth v. Howard*, 8 Bing. 451; *Stiles v. Western R. R. Co.*, 8 Met. 44 [41 Am. Dec. 486].

Now, in the case before us, it does not appear that at the time of the conversation and admissions of Scroggs, before stated, he was acting either in his office for the plaintiff, or as agent for the plaintiff in collecting his debt; but on the contrary, it appears that the conversation was of a transaction and business which had occurred some time before, in regard to which it is to be presumed his agency had ceased, and there is certainly nothing to show that it yet continued at the time of the conversation. We think it very clear, therefore, that the testimony of those witnesses was, on this ground, incompetent, and that the objection taken to it should have been sustained.

Nor was their testimony competent, in the present state of the case, to discredit or impeach the evidence of Scroggs, the plaintiff's witness, who deposed in regard to the alleged payment, and declared that no such payment on the plaintiff's debt had been made. To impeach this witness, by the statement of the others, it was first necessary to call his attention to his alleged conversation and admissions, and to ask him if he had held that conversation or made those admissions. If he answered by a denial, it would then be competent to im-

peach his credit before the jury, by proving the conversation and admissions, but not otherwise. It would be a manifest injustice to the party and the witness to impeach his character by proof of statements made on other occasions, without first calling his attention to them, and giving him an opportunity to explain their true nature and character.

It might appear from such explanation that the conversation or statement was unimportant in itself, or that it had been wholly misunderstood or misconceived by the impeaching witnesses. If, then, it be proposed to contradict and impeach the witness, by proving that he had made statements out of court different from those to which he now testifies, it is first necessary to ask him as to the "time, place, and person involved in the supposed contradiction," and not generally whether he had ever said so and so, or always made the same statement. And it is further to be observed that it is only in regard to "matters relevant to the issue that the witness can thus be contradicted:" See 1 Greenl. Ev., sec. 462; Cowen & Hill's Notes to 1 Phill. Ev., note 533; *Queen's Case*, 2 Brod. & B. 313; *Regina v. St. George*, 9 Car. & P. 489.

Now, in the present case, the defendant did not propose any such testimony, nor ask the plaintiff's witness any question as to said alleged conversation or admission about the payment. If he had done so, and the witness had denied the conversation, it would then have been competent to prove it by the other witnesses.

In the next place, we are strongly inclined to think, from the testimony in the record, that the alleged payment was not in fact made. The true state of the case most probably was, that a payment made for another purpose and to be applied to other debts was, by misapprehension of the facts, made to apply as a credit to plaintiff's debt. This matter will, however, be again submitted to the circuit court, on such proof as the parties may bring before it.

Let the judgment be reversed, and the cause be remanded for further proceeding.

ADMISSIONS OF AGENTS AS EVIDENCE AGAINST HIS PRINCIPAL.—Generally, the declarations or admissions of one man can only be used as evidence against another when they are made under oath. But this rule is not universal in its application. An important exception arises when the parties stand towards each other in the relation of principal and agent. In such case, the agent stands in the place of the principal, and acts for and in his behalf. The maxim, *Qui facit per alium, facit per se*, is invoked, and as the principal's

own declarations and admissions would bind him, and be evidence against him, so those of the agent will be received in evidence against the principal, the same as if he had conducted in person the transaction in which the admissions were made. The rule applicable to the introduction in evidence of the admissions of agents, as deduced from the authorities, seems to be that where they are made by an agent, in a matter within the scope of his authority, at the time of and relating to the transaction, and are a part of the *res gestæ*, such admissions will be admitted in evidence against the principal, and the agent himself need not be called: *Pinnix v. McAdoo*, 68 N. C. 56; *Anderson v. Rome, Watertown, and Ogdensburg R. R. Co.*, 54 N. Y. 334; *Willard v. Buckingham*, 36 Conn. 395; *Sweatland v. Illinois and Mississippi Telegraph Co.*, 27 Iowa, 433; *Robinson v. Walton*, 58 Mo. 380; *Linblom v. Ramsey*, 75 Ill. 246; *Lafayette & Ind. R. R. Co. v. Ehman*, 30 Ind. 83; *Rowell v. Klein*, 44 Id. 290; *Burnham v. Grand Trunk R'y Co.*, 63 Me. 298; *Campbell v. Hastings*, 29 Ark. 512; *White v. Miller*, 71 N. Y. 118; *Ashmore v. Penn. Steam Towing Co.*, 38 N. J. L. 13; *Dickman v. Williams*, 50 Miss. 500. By the above statement of the rule in regard to admissions, it will be seen that it is not every admission or declaration of an agent that will bind the principal, or that will be permitted to be given in evidence against him. On the contrary, there are a number of limitations upon the rule allowing agents' admissions and declarations to be given in evidence; and these we will consider more in detail.

AGENT'S ADMISSIONS, TO BE EVIDENCE, must have been made in a matter within the scope of his authority, or, as it is sometimes declared, as regards the subject-matter. Where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him. So long as the agent acts within the scope of his authority, it is as if the principal himself were present, and as he himself would be bound by his admissions, so he is bound by those of his authorized representative. Thus a railroad company, having authorized an agent to account for the baggage of passengers, was held to be bound by his statements regarding the loss made the day after it occurred: *Morse v. R. R. Co.*, 6 Gray, 450; and so, too, in an action for the amount of the subscription to stock, the defendant alleged that it was stipulated by the agent of the company that his subscription was not to be paid until a certain amount had been subscribed, and it was held that this evidence was admissible: *Rinesmith v. People's Freight Railway Co.*, 90 Pa. St. 262; and in *Baring v. Clark*, 19 Pick. 220, 226, the court say: "The agent was acting and speaking for the defendant under and within the general scope of his authority; and his confessions are to be taken as if they had been made by the defendant himself." *Columbia Ins. Co. v. Masonheimer*, 76 Pa. St. 138; *Malecek v. R. R. Co.*, 57 Mo. 17. The rule that the declarations and admissions of an agent, acting within the scope of his authority, and made in reference to the business in which he is employed, may be received in evidence as the declarations of the principal, is supported by *City Bank v. Bateman*, 7 Har. & J. 104; *American Fur Co. v. United States*, 2 Pet. 358; *Sharp v. New York*, 40 Barb. 256; *Kasson v. Mills*, 8 How. Pr. 377; *Hunter v. Hudson River Co.*, 20 Barb. 493; *Stewartson v. Watts*, 8 Watts, 392; *Chorpenning v. Royce*, 58 Pa. St. 476; *Fring v. Breymeyer*, 2 Phila. 92; *Central Branch Union Pac. R. R. Co. v. Butman*, 22 Kan. 639; *Merchants' Dispatch Transportation Co. v. Leynor*, 89 Ill. 43; *Wilson Sewing Machine Co. v. Sloan*, 50 Iowa, 367; *McCormick v. Demary*, 10 Neb. 515; *Dowdall v. Pennsylvania R. R. Co.*, 13 Blatchf. 403; *Mut. Benefit Life Ins. Co. v. Cannon*, 48 Ind. 264; *Galceran v. Noble*, 66 Ga. 367.

But if the admissions sought to be introduced were made by one having no

authority to represent the principal in the matters concerning which the admissions are made, they are necessarily inadmissible. "When an agent is acting within the scope of his authority, his declarations accompanying his acts are admissible as they may qualify his acts; but his declarations as to other matters and transactions are merely hearsay testimony:" *Stiles v. Western Railroad*, 8 Met. 46. So the declarations of a son, while employed in performing a contract for his services made by him as agent for his father, were deemed inadmissible in evidence to prove the terms of the contract, the court holding that his declarations were not within the scope of his authority; that while he was authorized to make the contract, he was not authorized to relate its terms to others so as to thereby bind the plaintiff: *Corbin v. Adams*, 6 Oush. 93. A conductor cannot bind a railroad company by agreeing to give a free ride to a person: *Wakefield v. South Boston Railroad*, 117 Mass. 544. Nor will his declaration, made a moment before the occurrence of an accident, that the road was in such bad condition that his train had run off the track five times in the preceding trip, be admitted in evidence to prove negligence on the part of the company: *Mobile & M. R. R. v. Ashcroft*, 48 Ala. 15. Nor can the declarations of an engineer or a car-driver regarding a collision be received to affect his employers, he not being authorized to speak for the company: *Robinson v. Fitchburg etc. R. R. Co.*, 7 Gray, 92; *Luby v. Hudson River R. R. Co.*, 17 N. Y. 131. An agent who has no power to sell cannot make an admission of a sale to bind his principal: *Doe v. Robinson*, 24 Miss. 688. And generally, admissions to be binding must be made as to a business matter within the scope of the agency: *Rowell v. Klein*, 44 Ind. 290; *Chicago R. R. Co. v. Lee*, 60 Ill. 501; *Chicago R. R. Co. v. Riddle*, Id. 534; *Anderson v. Rome etc. R. R. Co.*, 54 N. Y. 334; *Baltimore etc. R. R. Co. v. Christie*, 5 W. Va. 325; *Mundhenk v. Central Iowa R'y Co.*, 57 Iowa, 718; *Meyer v. Virginia & Truckee R. R. Co.*, 16 Nev. 341; *Memphis & Charleston R. R. Co. v. Maples*, 63 Ala. 601; *Green v. Ophir Copper S. & G. M. Co.*, 45 Cal. 522. Under the California code, section 1838, a depositary is not bound by the admissions of his attorney as to how the loss of the deposit occurred: *Wilson v. Southern Pacific R. R. Co.*, 53 Cal. 735. It is not necessary that any specific instructions be given the agent in order to confer on him power to bind his principal by his admissions or declarations. Indeed, if an agent acts within the general scope of his authority, he may bind his principal, even though his acts be in violation of specific instructions given him by the principal. Thus where defendants sent a servant to employ a physician to visit a boy who had been injured in their service, directing him to tell the physician they would pay him for the first visit, which the servant forgot to mention but employed him generally: held, that the physician having attended the boy until he recovered, the defendants were liable to him for the whole bill: *Barber v. Britton*, 26 Vt. 112, cited and approved in *Meindorff v. Wick-ersham*, 63 Pa. St. 87.

AGENT'S ADMISSIONS OR DECLARATIONS, TO BE EVIDENCE, MUST BE PART OF RES GESTÆ.—This rule is well settled: *American Fur Co. v. United States*, 2 Pet. 358; *North River Bank v. Aymar*, 3 Hill (N. Y.), 262; *Sandford v. Handy*, 23 Wend. 260; *Bank of U. S. v. Davis*, 2 Hill (N. Y.), 451; *Carpenter v. American Ins. Co.*, 1 Story, 57; *Randall v. Ches. & Del. Canal Co.*, 1 Harr. (Del.) 234; *Lee v. Munroe*, 7 Cranch, 366; *Thalhimer v. Brinckerhoff*, 4 Wend. 394; S. C., 21 Am. Dec. 155; *Stewartson v. Watts*, 8 Watts, 392; *Loddell v. Baker*, 1 Met. 193; *Fairlie v. Hastings*, 10 Ves. 125; *Dawson v. Atty*, 7 East, 367; *Fisher v. Mather*, 1 T. R. 12; *Bree v. Holbeck*, 2 Doug. 654; *Gott v. Dinmore*, 111 Mass. 45; *Brooks v. Jameson*, 55 Mo. 505; *Robinson v. Walton*, 58 Id. 390;

McComb v. N. C. R. R. Co., 70 N. C. 178; *Sweatland v. Illinois etc. Telegraph Co.*, 27 Iowa, 433; *Linblom v. Ramsey*, 75 Ill. 246; *Gutchess v. Gutchess*, 66 Barb. 483; *Newton etc. v. White*, 53 Ga. 395; *Adams v. Humphreys*, 54 Id. 496; *Swenson v. Aultman*, 14 Kan. 273. When the statements, declarations, or admissions of the agent are made at the time of the transaction, and enter into and become part of it, they are no longer hearsay, but are part of the contract itself, and are admissible in evidence. In *Mix v. Osby*, 62 Ill. 193, it was declared that the statements of an agent made at the time of hiring a party to labor for his principal, in reference to his employment, was not hearsay, but pertinent and legitimate evidence against the principal in a suit against him by the laborer to recover wages. So, too, where an insurer's agent had agreed to renew a policy and had received the premium, and some time thereafter being asked by the assured for the certificate of renewal, he insisted he had previously delivered it to the assured, it was held that this constituted part of the *res gestæ*, and was binding on the part of the insurer: *Scott v. Home Insurance Co.*, 53 Wis. 238. In an action against a railway company to recover for damage from a fire that had spread from the burning of grass and weeds, declarations by the defendant's servants as to the setting of the fire were held admissible, against the defendant, as part of the *res gestæ*: *Ohio & Miss. R'y Co. v. Porter*, 92 Ill. 437. So, too, was the statement of the superintendent of a manufacturing company that a nuisance complained of against the company would be remedied, and admitting its existence: *McGenness v. Adriatic Mills*, 116 Mass. 177. And where freight had been lost, and the agent declared that he thought perhaps T. had got it, the statement was admitted in evidence: *Lane v. Boston & Albany R. R. Co.*, 112 Id. 455.

AGENT'S ADMISSIONS, TO BE EVIDENCE, MUST HAVE BEEN MADE AT TIME of the transaction. If made upon any other occasion than the very time of the contract, transaction, or proceeding, it will be considered as having no relation to it, as being no part of the *res gestæ*, and wholly inadmissible as evidence. In *Innes v. Steamer Senator*, 1 Cal. 461, it was held that the declarations of the master, made the morning after the collision, were no part of the *res gestæ*, and inadmissible. So in *Mateer v. Brown*, Id. 224; S. C., 52 Am. Dec. 303, declarations made concerning the receipt of gold-dust the day after it had been deposited with the agent were held hearsay merely. The conversations of a captain of a steamboat, where a party had been injured in getting on the boat, made two and a half days after the accident occurred, in which he attributed the accident to the carelessness of the servants of the boat in putting out the plank, is not evidence to charge the owners of the boat with fault, and this, though made while the boat was still on its voyage, and before the voyage upon which the injured party had entered was completed: *Packet Co. v. Olough*, 20 Wall. 528; *Murphy v. May*, 9 Bush, 33. So the declarations of an engineer of a railroad company regarding an accident that happened to the train on which he was employed, made a few days after the accident, are not admissible in evidence in an action against the corporation for negligence of the engineer: *Robinson v. Fitchburg etc. R. R. Co.*, 7 Gray, 92. Nor is a statement made by the defendant's servant, a week after the cause of action arose, concerning the negligence of his principal, admissible: *Memphis R. R. Co. v. Maples*, 63 Ala. 601. Nor are the admissions of a car-driver that his brakes were out of order, made after the car was stopped, evidence against the company, in a suit against it for running against and injuring a person: *Luby v. Hudson River R. R. Co.*, 3 E. D. Smith, 731. Nor is the admission of the superintendent of a railway company, made the day after an accident, as to

the unfitness of the conductor: *Huntington etc. R. R. Co. v. Decker*, 82 Pa. St. 119. Nor can a brakeman bind a railroad company by his subsequent admissions as to the cause of a disaster resulting in destruction of the baggage-car by fire: *Michigan Central R. R. Co. v. Carrow*, 73 Ill. 348. But declarations made by an agent after the contract is made by him are held admissible against his principal, where the agency still continues, and the declarations form part of a conversation between the parties mutually explanatory of the contract just entered into, or form part of the agent's report to his principal: *Baldwin v. Ashby*, 54 Ala. 82. And generally, to the point that declarations or admissions with reference to by-gone transactions cannot be given in evidence against the principal, see *White v. Miller*, 71 N. Y. 118; *Greer v. Higgins*, 8 Kan. 519; *Stewartson v. Watts*, 8 Watts, 392; *Anderson v. R. W. & O. R. R. Co.*, 54 N. Y. 334; *Michigan Central R. R. Co. v. Gougar*, 55 Ill. 503; *Wheelock v. Town of Hardwick*, 48 Vt. 19; *Corbin v. Adams*, 6 Cush. 95; *Sweetland v. Ill. & Miss. Tel. Co.*, 27 Iowa, 434; *Chicago, B., & Q. R. R. Co. v. Lee*, 60 Ill. 501; *Chicago, B., & Q. R. R. Co. v. Riddle*, 60 Id. 534; *Central R. R. Co. v. Kelly*, 58 Ga. 108; *Bowen v. School Dist.*, 36 Mich. 149; *Great Western Railway Co. v. Willis*, 18 C. B., N. S., 748.

AGENCY MUST BE PROVED BEFORE AGENT'S ADMISSIONS WILL BE ADMITTED IN EVIDENCE.—The fact of agency must be established before the admissions of the alleged agent can be allowed to be given in evidence against the principal, and the proof must be *aliunde*: *Francis v. Edwards*, 77 N. C. 271; *Breckenridge v. McAfee*, 54 Ind. 141; *Streeter v. Poor*, 4 Kan. 412; *Mapp v. Phillips*, 32 Ga. 72; *Brigham v. Peters*, 1 Gray, 139; *Fairlie v. Hastings*, 10 Ves. 126; *Campbell v. Hastings*, 29 Ark. 512; *Peck v. Ritchie*, 66 Mo. 114; *Coon v. Gurley*, 49 Ind. 199; *Reynolds v. Ferree*, 86 Ill. 570; *Barrow v. Brown*, 23 La. Ann. 459. But if the agency is sufficiently proved after the declarations have been admitted, the error of their admission in the first instance is cured: *Rosell v. Klein*, 44 Ind. 291; *Rhodes v. Lowry*, 54 Ala. 4.

ADMISSIONS OF PUBLIC AGENTS.—"Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. Principals in the latter category are in many cases bound by the acts and declarations of their agents, even where the act or declaration was made or done without any authority, if it appear that the act was done or declaration was made by the agent in the course of his regular employment. But the government or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority, or that he had been held out as having authority to do the act, or was employed in his capacity as a public agent to do the act or make the declaration for the government: *Story on Agency*, 6th ed., sec. 307a; *Lee v. Murree*, 7 Cranch, 376. Although a private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of a like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment and injury of the public: *Mayor v. Reckback*, 17 Md. 282;" *Whitenside v. United States*, 93 U. S. 247. Briefly, the rule is, that individuals are liable to the extent of the power they have apparently given to their agents; a government is liable only to the extent of the power it has actually given to its officers: *The Floyd Acceptances*, 7 Wall. 666; S. C., *Pierce v. United States*, 1 Ct. Cl. 270; *Grant v. United States*, 5 Id. 71; *State v. Hayes*, 52 Mo. 578. Individuals must take notice of the extent of the authority of a person act-

ing in an official capacity, and if they fail to do so, their ignorance of the law will furnish no excuse for any mistake or wrongful act: *State v. Hayes, supra*; *Mayor v. Reynolds*, 20 Md. 10; *People v. Bank*, 24 Wend. 431; *Delafield v. State*, 26 Id. 238. Thus where the statute limits the amount of expenditure, the officers or contractors cannot go beyond it. If they do, the claimant must be deemed to have contracted with them beyond the limit fixed by law at his own risk: *Curtis v. United States*, 2 Nott & H. 144; *Hull v. County of Marshall*, 12 Iowa, 142.

CLOUD v. HAMILTON.

[11 HUMPHREYS, 104.]

FATHER MAY WAIVE HIS RIGHT TO MINOR CHILD'S SERVICES for the benefit of the child, and permit him to act for himself; and this may be done either expressly or by implication.

ACQUISITIONS OF MINOR ACTING FOR HIMSELF are his own, and not his father's, where the father has waived his rights to his son's services.

ASSUMPSIT. The opinion states the facts.

Trehitt and Gaut, for the plaintiff.

Blizzard and Collins, for the defendant.

By Court, TOTTEN, J. The action is *assumpsit* on the common counts for labor and services; and the case is, that the plaintiff's son, William, at about the age of seventeen years, went into the service of Robert W. Hamilton, a tanner, with a parol understanding between him and William, that William should reside with him for some three years, and learn the business and art of tanning. William went, at first, without his father's consent, but the proof shows that he afterwards consented to William's continuing in Hamilton's service, upon their own agreement, but declined to become a party to any contract between William and Hamilton, or to have any interest in it. William remained with Hamilton about a year and a half, principally engaged in the tan-yard, when he quit Hamilton's service on some disagreement between them, and thereon the plaintiff institutes this suit to recover for his son's labor and services. The court charged, in effect, that the plaintiff might recover for the labor and service of his son, if he went and continued in defendant's employment without the consent of the plaintiff, but he could not recover if he consented that his son might act in that matter upon his own agreement and for his own benefit. It is unquestionably true that the father, being under obligation to maintain and in some degree to educate his infant children, is entitled to the custody of their persons, and to the value of their labor and services. If the

infant do labor and service for another, without the father's consent, such person will be liable therefor, at the suit of the father. But the father may waive this right for the benefit of his child, and permit him to act for himself, upon his own rights and responsibilities, and for his own benefit, and this waiver may appear by express agreement, or be implied from facts and circumstances. If he waive his rights, and permit his son to make contracts and acquisitions for himself, they are his contracts and acquisitions, and not the father's: See *Burlingame v. Burlingame*, 7 Cow. 92; *McCoy v. Huffman*, 8 Id. 84; *Shute v. Dorr*, 5 Wend. 204; 2 Kent's Com. 194, note.

The question whether the plaintiff had thus waived his right, was fairly left to the jury, and we think they have decided correctly. The plaintiff having waived his right in this respect, it is not material to determine the legal effect of the agreement entered into by his son with defendant's intestate.

We do not think, in view of the facts of this case, that the plaintiff has any cause of action against the defendant.

Let the judgment be affirmed.

FATHER IS ENTITLED TO EARNINGS OF HIS MINOR CHILD, but may voluntarily relinquish the right, and the son will be entitled to recover the value of his services from his employer, who may not have known of the relinquishment: *Corey v. Corey*, 31 Am. Dec. 117. If the minor contract on his own account with the knowledge and without the objection of his father, there is an implied assent that the minor shall have his earnings: *Whiting v. Earle*, 15 Id. 207. An agreement between a father and son that the latter may have his earnings is irrevocable: *Morse v. Welton*, 16 Id. 73, and note.

MAPLES v. TUNIS.

[11 HUMPHREYS, 103.]

AFFIDAVIT FOR ATTACHMENT FORMS MATERIAL PART OF RECORD, and judicial notice will be taken of it by the court.

EFFECT OF AFFIDAVIT FOR ATTACHMENT BEING DEFECTIVE in not stating the cause for which it issued, though proper in form, is to vitiate the sale and render it void.

AFFIDAVIT FOR ATTACHMENT MAY BE AMENDED upon motion, and it is not error to permit it.

MORE LIBERAL CONSTRUCTION OF RECENT STATUTES relating to attachments suggested.

ANCESTOR'S AGREEMENT NOT WORKING ESTOPPEL ON HEIRS.—T., a debtor, applied to M., his creditor, to purchase a piece of land at sheriff's sale, and to give him further time to redeem it in. The creditor agreed, and purchased accordingly. The debtor died. Defendants came in under him. No offer to redeem the land had been made. *Held*, that defendants were not estopped to dispute plaintiff's title in an action of ejectment.

EJECTMENT. The opinion states the facts.

Boyd and Rogers, for the plaintiff.

R. H. Hynds, for the defendant.

By Court, **TOTTEN, J.** This action in ejectment was tried in the circuit court of Sevier at July term, 1850. The verdict and judgment were for defendants, and the plaintiff's motion for a new trial having been overruled, he appeals in error to this court.

The principal question relates to the validity of a sheriff's deed to the plaintiff's lessor for the land in question, the deed being founded on proceedings in attachment. The suit, in attachment, was instituted before a justice of the peace on the seventh of December, 1848. The land having been levied in virtue of the attachment, there was judgment against the defendant in that suit; and the execution issued thereon was levied on the same land. The entire proceeding was then recorded in the circuit court, and an order of sale made, in conformity to the act of 1840, chapter 161. The deed in question was executed in pursuance of a sale made in virtue of this order.

It appears from the record of these proceedings that the affidavit was defective in not stating the cause for which the attachment issued, whilst the attachment is good in point of form, and assumes, in effect, that a perfect affidavit was made.

It is now insisted by counsel that the writ of attachment shall be conclusive, as to the material facts it assumes, and that it can neither be aided nor impaired by reference to the affidavit required in such cases; that the affidavit is not required to be recorded with the other proceedings in the circuit court, and that therefore we can take no judicial notice of it.

It will be observed, however, by reference to the act just referred to, that it is required that the affidavit be made part of such record. We think it a reasonable and proper rule, that the validity of this description of judicial sales shall be tested by the record of the circuit court, made in pursuance of the statute. It was intended by the statute that such record should be the proper and permanent memorial of the validity of the sale.

The affidavit forms a material part of the record, and we think we are not precluded by the writ of attachment from taking judicial notice of it. On the contrary, it forms the

basis of the suit, and no attachment could lawfully issue without a proper affidavit.

In view of the statute law in force at the date of this proceeding, the attachment would be strictly construed as being in derogation of the common law, or the right of the party to be summoned to make defense before any judgment could be rendered against him. It is, therefore, a settled rule in a series of cases, that any material departure from the requirements of these statutes will vitiate the proceeding and render it utterly void. In such case, the judgment and sale are void, and communicate no title to the purchaser: See act 1794, c. 1; *Earthman v. Jones*, 2 Yerg. 484; *McCulloch v. Foster*, 4 Id. 162; *Conrad v. McGee*, 9 Id. 428; *McReynolds v. Neal*, 8 Humph. 12.

It was intended by the attachment under the act of 1794 to compel the appearance of the defendant, and it was regarded, like the *capias ad respondendum*, as the leading process in the cause. The defendant was permitted, upon giving special bail, as upon a service of the *capias*, to replevy the property attached, and make defense to the action. Upon his failure, however, to do so, the proceeding, if in strict conformity to the statute, was held sufficient to authorize a valid judgment and execution.

But we apprehend that, in view of the abolition of the *capias* and of imprisonment for debt, and the enlarged and liberal provisions contained in more recent statutes on the subject of attachments, a more favorable and liberal construction of these laws should be adopted. The original attachment under these statutes must be considered, not only as a substitute for the summons, but as a means by which, in the cases specified, the creditor may be protected against the fraudulent conduct of the debtor.

This policy is very evident, in the act of 1843, chapter 29 (passed the eighth of December), extending the remedy by attachment, and making important and material changes in the law on this subject in favor of the remedy.

But this doctrine to which we have here merely alluded in general terms, was fully stated and discussed by Green, J., delivering the opinion of the court at Jackson, last term, in the case of *Boyd v. Buckingham*, 10 Humph. 434, which opinion we have not at present before us. In the case of *McReynolds v. Neal*, 8 Id. 12, no affidavit had been made, and on motion of defendant to quash in the circuit court, the plaintiff offered to amend; that is, to supply this defect by making and filing a proper affidavit, and it was held not to be error to re-

fuse it. We do not say there was error in this judgment, because in point of fact there was nothing to amend; the motion was to make and file the affidavit *de novo*. But if the motion to amend had been of a defective affidavit, we should have held it proper in the circuit court to permit the amendment, and the proceeding would not be vitiated by reason of the defect, provided a proper amendment were made by order of the court.

This does not, however, change the character of the present case; the affidavit was materially defective and was not amended. The consequence is, that the judgment and execution on the attachment were void, and the sale communicated no title to the purchaser.

2. There is proof tending to show that William Tunis, the debtor, applied to the creditor to purchase the land at the sale and give the debtor further time to redeem it, to which the creditor agreed, and accordingly purchased the land. The debtor died, and it does not appear that any offer was ever made by him in his life-time, or by his heirs since his death, to redeem the land. It is now insisted that the defendants, who came in originally under the debtor, are estopped, by reason of this state of facts, from making any objection to the plaintiff's title. We concur with his honor, the circuit court judge, that any question which may be raised upon these facts is exclusively of equitable cognizance, and that they do not form any legal estoppel upon the defendants to dispute the plaintiff's title in the action of ejectment. The estoppel in such case should appear by record or by deed, and we have seen that there is not any valid record or valid deed. It is not pretended that any relation of tenancy was created by the agreement of the parties.

In the view we have taken of the case, it is not deemed material to notice any other question.

Let the judgment be affirmed.

THE PRINCIPAL CASE IS CITED to the point that the affidavit in attachment cases is a part of the record, in *Watt v. Carnes*, 4 Heisk. 534.

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1. TITLE TO CHATTELS IS NOT CHANGED BY BESTOWAL OF LABOR or skill upon them, by a willful wrong-doer, in manufacturing them or changing them into a commodity of another kind. No matter how great the transformation may be, the true owner may follow and reclaim his materials as far as he can prove their identity. *Silsbury v. McCoon*, 307
2. WILLFUL TRESPASSERS TAKING CORN AND MAKING IT INTO WHISKY ACQUIRE NO TITLE, and can maintain no action against an officer seizing and selling the whisky in their distillery, on an execution against the owner of the corn. *Id.*
3. WHERE ARTICLES OF SAME KIND AND VALUE ARE MINGLED TOGETHER by the consent of the parties, each party is entitled to have divided to him as much as he may have put in, and is recognized in law as having a property in so much as he may have put into the common stock. *Inglebright v. Hammond*, 430.

ACCOUNT.

1. THERE ARE TWO JUDGMENTS IN ACTION OF ACCOUNT: first, that the plaintiff and defendant account together; and second, that the plaintiff or defendant recover the balance found to be due. *McPherson v. McPherson*, 416.
 2. IN ACTION OF ACCOUNT AGAINST CO-TENANTS it is error to require, as a preliminary question before the first judgment, that the plaintiff and defendant account together, is given, that the plaintiffs should prove to the jury that the defendant has received more than a just share of the profits. *Id.*
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2. **DATING ACKNOWLEDGMENT IN DEED BEFORE EXECUTION OF DEED** does not invalidate the deed, and it is admissible in evidence, where the dating of the acknowledgment before was a mere clerical mistake, which the instrument itself sufficiently corrected. *Id.*

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 3. **BY RATIFICATION, DOINGS OF SELF-CONSTITUTED AGENT** become, in contemplation of law, the acts of the principal, with all the consequences that follow the same act done by previous authority; unless it might operate to defeat means rights acquired *bona fide*, by third persons, or subject them to some loss, to which otherwise they would not be liable. *Id.*
 4. **DECLARATIONS OF AGENT ARE ADMISSIBLE** when made in the performance of some act that would bind the principal. They are then part of the *res gestæ*, and are in the nature of original evidence. *Moore v. Bettie*, 771.
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2. **ALTERATION OF FIGURES ON MARGIN OF BILL of exchange**, indicating the amount, so as to conform it to the body of the bill, without the drawer's knowledge, does not avoid it, the figures constituting no part of the bill. *Smith v. Smith*, 652.
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2. WHATEVER IS CALCULATED TO ESTABLISH DANGEROUS PROPENSITY OF ANIMAL, in a sufficient degree, tends to support the allegation in a count that the owner has actual knowledge of the same, is conformable to precedent, and is sufficient after verdict. *Id.*
3. OWNER OF HORSE ALLOWING HIM TO GO LOOSE IN STREETS of a populous city is liable for the personal injuries caused by the horse, without allegation or proof that he knew the horse was vicious. *Goodman v. Gay*, 589.
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3. ATTORNEY FOR PLAINTIFF IN EXECUTION, PURCHASING PROPERTY sold under the execution, contrary to plaintiff's orders, is responsible for the amount of the judgment under which the property was sold. *Fisher v. Knox*, 503.
4. ATTORNEY IS NOT ENTITLED TO COMPENSATION when he does not offer to his client all the money he is bound to pay him within a reasonable time. *Id.*

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2. SERVANT TAKING GOODS ON DEPOSIT WITHOUT AUTHORITY of and unknown to his master will alone be liable therefor, though he deposit them in his master's house. *Id.*
3. DEGREE OF CARE NECESSARY IN CASE OF GRATUITOUS DEPOSIT, to avoid imputation of bad faith, is estimated by the carefulness which the depository uses towards his own property of a similar kind. *Id.*

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1. **PROMISE BY BANKRUPT TO PAY DEBT DISCHARGED BY CERTIFICATE** in bankruptcy is binding, though not made to the creditor or his authorized agent. *Haines v. Stauffer*, 493.
2. **DISCHARGE IN BANKRUPTCY APPLIES TO JUDGMENT RECOVERED BEFORE DISCHARGE** was granted, though after the petition filed, if the debt on which it is founded would have been barred by the discharge. The judgment is not deemed a new indebtedness created since the petition, but only a novation; so held under the bankrupt law of 1841. *Clark v. Rooting*, 290.
3. **BANKRUPT MAY SET UP DISCHARGE AS DEFENSE TO SUIT IN NATURE OF CREDITOR'S BILL** to obtain satisfaction of the judgment; he is not confined to his remedy by motion. *Id.*
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2. **ACT OF TWENTY-FIFTH OF MARCH, 1824, FOR GOVERNMENT OF BANKS**, intends by the word "deposits" current money received by the bank as such, and does not authorize a deposit of a sealed bundle containing notes, the issuance of which had been interdicted. *Id.*
3. **BANK MAY MAKE GENERAL ASSIGNMENT** of its property and effects, and such assignments, if in other respects fair, will be sustained. *State v. Commercial Bank*, 106.
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See **PLEADING AND PRACTICE**, 15-17, 21.

BILLS OF EXCHANGE.

See ALTERATION OF INSTRUMENTS, 2; NEGOTIABLE INSTRUMENTS, 11-17, 23-24, 29; SURETYSHIP, 5.

BLANK INDORSEMENTS.

See NEGOTIABLE INSTRUMENTS, 3, 8.

BLANKS.

See BONDS.

BONA FIDE PURCHASERS.

See ALTERATION OF INSTRUMENTS, 3; NEGOTIABLE INSTRUMENTS, 17, 20; NOTICE: TRUSTS AND TRUSTEES, 2.

BONDS.

OMISSION TO WRITE NAMES OF OBLIGORS IN BODY OF BOND does not avoid it, and it is binding upon all who sign it. *Johnson v. Steamboat Leligh*, 162.

See EXECUTORS AND ADMINISTRATORS, 6; NEGOTIABLE INSTRUMENTS, 13; SURETYSHIP, 2; TRUSTS AND TRUSTEES, 2; VENDOR AND VENDEE, 1.

BOOKS OF ACCOUNT.

See CORPORATIONS, 37; EVIDENCE, 8-11; WITNESSES, 7, 8.

BOUNDARIES.

See EVIDENCE, 3; WATERCOURSES, 1, 2.

BURDEN OF PROOF.

See ALTERATION OF INSTRUMENTS, 1; FRAUDULENT CONVEYANCES, 9; CONSTITUTIONAL LAW, 4; FRAUD, 3; HIGHWAYS, 9.

CARRIERS.

See COMMON CARRIERS.

CAVEAT EMPTOR.

See SALES, 12.

CERTIFICATES.

See ELECTIONS, 1.

CHARACTER.

See MARRIAGE AND DIVORCE, 11; WITNESSES, 14, 15.

CHARTERS.

See CORPORATIONS, 6, 10, 12, 14, 17-21, 23, 29, 41; INSURANCE—FIRE, 2, 4.

CHILDREN.

See PARENT AND CHILD; WILLS, 20.

CHOSES IN ACTION.

See ASSIGNMENT OF CONTRACTS; HUSBAND AND WIFE, 1; PARTNERSHIP, 5, 6.

CODICILS.

See WILLS, 11, 15.

COMMISSIONERS.

See DAMAGES, 1, 2.

COMMON CARRIERS.

1. CARRIER, TO EXEMPT HIMSELF FROM LIABILITY FOR DAMAGES resulting to goods intrusted to his care, must show that such damage proceeded from some cause which was within the exception to his general liability. *Cameron v. Rich*, 670.
2. GOODS DAMAGED BY DAMPNESS generated by the ordinary operation of natural causes, which might have been prevented by skill and care on the part of the carrier, will render him liable for the damages resulting therefrom. *Id.*

See SALES, 3.

COMMON PLEAS.

See PLEADING AND PRACTICE, 12.

COMPETENCY.

See WITNESSES.

CONFLICT OF LAWS.

See MARRIAGE AND DIVORCE, 4, 5.

CONFUSION OF GOODS.

See ACCESSION, 3.

CONSIDERATION.

See BANKRUPTCY AND INSOLVENCY, 4; CONTRACTS, 1, 2, 15; DEEDS, 1, 13; GUARANTY, 1-3; MARRIAGE AND DIVORCE, 6, 15; NEGOTIABLE INSTRUMENTS, 12; SALES, 11; STATUTE OF FRAUDS, 1; SURETYSHIP, 6; TRUSTS AND TRUSTEES; VENDOR AND VENDEE, 3, 4.

CONSTABLES.

See EXECUTIONS, 10; JURY AND JURORS, 9.

CONSTITUTIONAL LAW.

1. PARTY MAY RENOUNCE CONSTITUTIONAL PROVISION made for his benefit. *Embury v. Conner*, 325.
2. MEANING OF TERMS "DUE PROCESS OF LAW," in section 7, article 7 of constitution of New York, discussed. *Id.*
3. STATE LEGISLATURES ARE LIMITED IN REMEDIAL JURISDICTION only by express prohibition, or implication equally imperative flowing from positive provision, or deduced from the nature of the political structure. *Lycoming v. Union*, 575.
4. BURDEN IS ON ONE SEEKING TO IMPEACH LEGISLATIVE ACTION to show wherein it is unconstitutional. *Id.*
5. UNCONSTITUTIONALITY OF LEGISLATIVE ACT MUST BE PALPABLE AND CERTAIN to justify judicial interference. *Id.*

6. LEGISLATIVE ACT ENFORCING MORAL OBLIGATION NOT LEGALLY ENFORCEABLE is constitutional. *Id.*
7. LEGISLATURE MAY PROVIDE REMEDY WHERE RIGHT EXISTS WITHOUT ONE. *Id.*
8. ACT OF TWENTY-SEVENTH OF MARCH, providing that certain counties from which causes have been removed for trial to Union county, by virtue of the act of the thirteenth of April, 1843, reimburse Union county for the expenses of the said trials, is constitutional. *Id.*
9. LEGISLATURE HAS NO POWER TO ORDER NEW TRIAL, or to direct the court to order it, either before or after judgment; such power being judicial. *De Chastellux v. Fairchild*, 570.
10. LEGISLATIVE, EXECUTIVE, AND JUDICIAL BRANCHES OF GOVERNMENT ARE THOROUGHLY SEPARATED, and within their respective departments equal and co-ordinate. *Id.*

See EMINENT DOMAIN, 1, 2, 6; INTEREST, 1.

CONSTRUCTION.

See ATTACHMENTS, 5; BANKS AND BANKING, 2; CONTRACTS, 8; CORPORATIONS, 22, 32; DEEDS, 1, 2; EVIDENCE, 21; GUARANTY, 1; QUO WARRANTO, 1; WILLS, 17.

CONTEMPT.

1. DEFENDANT IN CONTEMPT CAN NEITHER FILE ANSWER nor be permitted to make a motion to dismiss a bill, until he be discharged of such contempt by order of the court. *Gant v. Gant*, 735.
2. CLERK OF COURT HAS NO AUTHORITY EITHER TO DISCHARGE CONTEMPT OR FILE ANSWER; and if an answer is filed, the plaintiff has the right to treat it as a nullity. *Id.*

CONTRACTS.

1. SERVICE RENDERED TO ONE WITHOUT HIS REQUEST IS SUFFICIENT CONSIDERATION for subsequent promise to pay therefor. *Lycoming v. Union*, 575.
2. ANY ADVANTAGE TO ONE PARTY OR DETRIMENT TO THE OTHER, however small, is a sufficient consideration to support a promise. *Davis v. Steiner*, 547.
3. IF CONNECTION BETWEEN ORIGINAL ILLEGAL TRANSACTION AND NEW PROMISE CAN BE TRACKED, if the latter is connected with and grows out of the former, no matter how many times and in how many different forms it may be renewed, it cannot form the basis of a recovery. Repeating a void promise cannot give it validity. *Comstock v. Draper*, 78.
4. ACTION TO RECOVER MONEY alleged to be due by contract may be sustained under the New York code of procedure, notwithstanding the contract is void, if the facts alleged and proved show an implied obligation resting on the defendant to pay the sum demanded as money received to plaintiff's use. *Eno v. Woodworth*, 370.
5. CONTRACTOR PREVENTED FROM COMPLETING CONTRACT BY EMPLOYING PARTY may either bring an action for a breach of the contract and recover as damages the loss of profits sustained by the breach, or he may waive the contract and sue for work and labor generally, and recover the actual value of the work done. *Clark v. Mayor etc. of New York*, 379.
6. CONTRACTOR SUING FOR WORK AND LABOR GENERALLY, when wrongfully prevented from completing the contract, cannot recover speculative

profits, or refer to the contract as furnishing a rule for computing the sum due him, but is confined to the actual value of the work and materials supplied. *Id.*

7. **VERBAL CONTRACT MAY BE PROVED**, although the parties have made a written contract at the same time touching the same subject, if it does not contradict or vary the writing. *Hereon v. Henderson*, 185.
 8. **COURT CAN MAKE NO EXPOSITION AGAINST EXPRESS TERMS OF WRITTEN CONTRACT.** *Pendergast v. Meserve*, 234.
 9. **ACTION OR SUIT UPON ILLEGAL CONTRACT** cannot be maintained either at law or in equity. *Ohio L. I. & T. Co. v. M. I. & T. Co.*, 742.
 10. **CONTRACT IN VIOLATION OF COMMON OR STATUTE LAW IS VOID ab initio**, and no action or suit will lie to enforce it. *Id.*
 11. **RULE PREVENTING SUIT ON ILLEGAL CONTRACTS RELATES ONLY TO REMEDY**, and merely denies the parties any remedy upon them. *Id.*
 12. **CONTRACT IS ILLEGAL WHEN IT VIOLATES GOOD MORALS**, or is opposed to public policy, or is infected with fraud, or violates the provisions of a public statute. *Id.*
 13. **CONTRACTS VIOLATING PUBLIC STATUTE** are equally void whether the prohibition is express or implied; *i. e.*, whether the statute expressly prohibits the thing to be done, or only imposes a penalty on the person doing it. *Id.*
 14. **WHETHER CONTRACT IS MALUM PROHIBITUM OR MALUM IN SE**, is not material; for in either case the courts will not enforce it. *Id.*
 15. **UPON REPUDIATING ILLEGAL CONTRACT, RECOVERY MAY BE HAD** in some instances for money paid as consideration, or an action may be maintained to cancel securities given. *Id.*
 16. **UPON CONTRACT INVOLVING MORAL TURPITUDE**, where the parties are *in pari delicto*, there is no remedy; no relief will be granted, no action will lie to enforce it, and money paid upon it cannot be recovered. *Id.*
 17. **UPON ILLEGAL CONTRACT, WHERE PARTIES ARE NOT IN PARI DELICTO**, relief will in general be granted on disaffirmance of the contract, if it be executed; if it be executory, it is the general rule to grant relief against it. *Id.*
 18. **UPON ILLEGAL EXECUTORY CONTRACTS, RELIEF WILL BE ALLOWED**, whether the parties were *in pari delicto* or not. *Id.*
 19. **PARTY IS NOT IN PARI DELICTO** when he acts under necessity, or hardship, or great inequality of condition, in entering into a contract in violation of a rule of public policy intended for his protection. *Id.*
- See ASSUMPSIT; AUCTIONS; BANKRUPTCY AND INSOLVENCY, 4; CORPORATIONS, 10; DAMAGES, 4, 5; DEEDS, 7, 8; EVIDENCE, 18-21; GUARANTY; INFANCY, 1; INTEREST, 1, 3; MARRIAGE AND DIVORCE, 6-8, 12-16; PARTNERSHIP; SALES; SPECIFIC PERFORMANCE; STATUTES; USAGES; VENDORS AND VENDERS.**

CONTRIBUTION.

See SURETYSHIP, 3, 4.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CONVERSION.

See TROVER.

CORAM NOBIS.

See PLEADING AND PRACTICE, 14.

CORPORATIONS.

1. CORPORATIONS HAVE SPECIES OF LOCALITY IN NATURE OF DOMICILE for the purpose of suing and being sued, under the Massachusetts revised statutes. *Raymond v. City of Lowell*, 57.
2. DIRECTORS OF CORPORATION ARE LIABLE AS TRUSTEES FOR FRAUDULENT BREACH OF TRUST, and equity has jurisdiction of such cases. *Hodges v. New England Screw Co.*, 624.
3. CORPORATION IS PROPER PARTY TO SUE DIRECTORS FOR FRAUDULENT BREACH OF TRUST in the first instance. *Id.*
4. STOCKHOLDERS MAY SUE DIRECTORS FOR FRAUDULENT BREACH OF TRUST in their own names, if the corporation refuses to sue or is still controlled by the defendants. *Id.*
5. DIRECTORS OF CORPORATION LENDING ITS INDORSEMENTS TO ANOTHER CORPORATION, with which it is connected in business, where they act in good faith and with sound discretion, are not personally liable therefor as for a breach of trust. *Id.*
6. DIRECTORS OF CORPORATION ARE NOT LIABLE FOR VIOLATION OF CHARTER THROUGH MISTAKE, unless the mistake arose from the want of such care as an ordinarily prudent man takes of his own affairs; especially where the mistake occurs in a matter as to which the law is unsettled. *Id.*
7. CORPORATION MAY INVEST IN STOCK OF OTHER CORPORATIONS in certain cases. As to whether it may do so with a view to becoming a permanent stockholder, is a question upon which the law seems to be unsettled. *Id.*
8. CORPORATION IS NOT TRUSTEE FOR ITS STOCKHOLDERS with respect to its corporate property so as to be subject to the jurisdiction of a court of equity at the suit of a stockholder. *Id.*
9. CASES RESPECTING EQUITY JURISDICTION OVER CORPORATIONS reviewed, per Greene, C. J. *Id.*
10. CHARTER OF CORPORATION IS NOT CONTRACT except as between the state and the corporation; and where it makes the stockholders liable for corporate debts, the liability does not arise out of contract, so as to give a court of equity jurisdiction of suits by stockholders against the corporation. *Id.*
11. EQUITY COURT HAS NO JURISDICTION TO DEGREE SALE OF STOCK TAKEN BY ONE CORPORATION IN ANOTHER without authority from the charter, so as to dissolve the relation between the corporations at the suit of a stockholder. *Id.*
12. SUBSTANTIVE ALTERATIONS OF CHARTER WITHOUT CONCURRENCE OF CORPORATORS is an unauthorized interference with the contract existing between the public and the corporators. *Com. ex rel. Claghorn v. Cullen*, 450.
13. ACT OR ASSENT OF CORPORATION MAY BE INFERRED from such circumstances of commission or omission as would raise a similar presumption in favor of or against a natural person. *Id.*
14. BOARD OF OFFICERS VESTED WITH ALL POWERS OF CORPORATION, and upon whom the corporate existence is devolved, not only wield the whole corporate authority, but may apply for and agree to radical changes in the charter thereof. *Id.*

15. **RIGHT OF ASSENTING TO PROPOSED CHANGE IN CHARTER** RESIDES in whole body of stockholders where they compose the corporation, though ordinarily represented by a board of directors charged with the exercise of corporate powers. *Id.*
16. **CORPORATION DOES NOT BECOME DEFUNCT FROM NEGLECT TO ELECT OFFICERS** while the capacity to elect remains in the members. *Id.*
17. **VOTE OF ACCEPTANCE OF AMENDMENT TO CHARTER**, to be valid as the act of the corporation, must be passed at a meeting duly convened, after notice to all the members. *Id.*
18. **WRITTEN ACCEPTANCE OF AMENDMENT TO CHARTER SIGNED BY MAJORITY** of members of corporation is not sufficient. *Id.*
19. **WRITTEN ACCEPTANCE OF AMENDMENT TO CHARTER SIGNED BY ALL STOCKHOLDERS** or parties in interest is sufficient. *Id.*
20. **PRESUMPTION OF ACCEPTANCE OF NEW OR AMENDED CHARTER, ARISING FROM ELECTION** of corporate officers thereunder, is not conclusive in the face of an objecting minority at such election. *Id.*
21. **OPPORTUNITY TO DELIBERATE, AND IF POSSIBLE CONVINCE THEIR FELLOWS**, is the right of the minority, of which they cannot be deprived by the arbitrary will of the majority. *Id.*
22. **ACCEPTING RIGHTS AND PRIVILEGES ENTAILS OBLIGATIONS AND DUTIES**. Where an act gives a corporation all the "rights and privileges" formerly given to another corporation, the words must be understood as implying the obligations and duties also: *Ohio L. I. & T. Co. v. Merchants' etc. Co.*, 742.
23. **CORPORATE POWERS NOT EXPRESSLY MENTIONED IN ITS CHARTER**.—A corporation in the execution of the purposes for which it was created, may resort to any means that would be proper for an individual in executing the same, unless it be prohibited by the terms of the charter or by some public law. *Id.*
24. **RESIDENCE OF CORPORATION** is in the state creating it, and it cannot migrate from it. *Id.*
25. **CORPORATION MAY ACT IN FOREIGN STATE**, and upon being recognized there may by its agents make any contract within its limited powers which are not prohibited by the foreign state. *Id.*
26. **CORPORATION IS LIABLE FOR ACTS OF ITS AGENTS** done in the performance of or connected with the business of the agency. *Id.*
27. **AGENT OR OFFICER OF CORPORATION IS LIABLE** for damages occasioned by violation of duties he owes to his principal. *Id.*
28. **CAPITAL STOCK IS TRUST FUND**, and the directors of the corporation are the trustees. *Id.*
29. **STOCKHOLDERS' LIABILITY FOR CORPORATE ACTS** under a clause in the charter declaring that they "shall be liable to the extent of their respective shares of stock held in such company, and no further," is wholly without reference to the amount they may have paid on the stock. *Id.*
30. **ASSIGNMENT OF CORPORATE PROPERTY DOES NOT CARRY CAPITAL STOCK WITH IT**. *Id.*
31. **MULTIFARIOUS BILL—IMPROPER JOINDER OF PARTIES AND CAUSES OF ACTION**.—A bill which seeks to enforce several separate demands against a corporation as such, against the stockholders as such, against them in their private capacity, and against them as trustees of the capital stock, and also as trustees in a deed of assignment for the benefit of creditors,

and which seeks to set aside the assignment and subject the property conveyed by it to the payment of the complainant's claims, is clearly multifarious. *Id.*

32. RESTRICTIONS ON CORPORATION NOT "TO EXERCISE BANKING PRIVILEGES," or issue "bills of credit," etc., are directed only against the business of banking as a pursuit. *Id.*
 33. SIGNING IS NOT NECESSARY TO VALIDITY OF ASSESSMENT made by the directors of a corporation. *North River Meadow Co. v. Shrewsbury Church*, 258.
 34. PRIVATE CORPORATION CREATED BY LEGISLATURE MAY LOSE ITS FRANCHISES by a misuser or non-user of them, and they may be resumed by the government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture. *State v. Commercial Bank*, 106.
 35. TEMPORARY SUSPENSION OF OPERATIONS, or the simple act of assignment of a corporation, is not a misuser of its chartered privileges. Neither will constitute a non-user, because both are within the exercise of a corporate franchise. Either might place the bank in a situation which would end in a non-user for the want of means with which to carry on its operations. *Id.*
 36. CONTINUED SUSPENSION OF PRINCIPAL CORPORATE FRANCHISES, and a failure to perform the implied conditions upon which the charter was granted, amount to a non-user, which would be good cause of forfeiture. *Id.*
 - W. BOOKS AND MINUTES OF CORPORATION ARE COMPETENT EVIDENCE of the proceedings of the corporation. *North R. M. Co. v. Shrewsbury Church*, 258.
 - W. MUNICIPAL CORPORATIONS ARE HOLDEN FOR EXERCISE OF DUE CARE and skill by officers, agents, and servants employed in the construction of public works authorized or undertaken in the exercise of corporate powers, and are liable in damages for the natural consequences of unskillfulness or negligence of such employees. *Rochester White Lead Co. v. Rochester*, 316.
 38. CITY IS LIABLE FOR FLOODING LOT BY IMPROPER CONSTRUCTION OF CULVERT, and by not making it large enough, where it authorizes the construction of such culvert for the purpose of carrying away surface water. *Id.*
 40. MUNICIPAL CORPORATIONS ARE NOT LIABLE to lot owners for injury to land or buildings caused by making a street improvement, where the work was authorized by law, and has been done with due care and skill, and no property of the plaintiff has been taken for public use. *Radcliff v. Mayor etc. of Brooklyn*, 357.
 41. AMENDMENT TO CHARTER OF MUNICIPAL CORPORATION takes effect without acceptance by the municipality. *Lycoming v. Union*, 575.
- See ALTERATION OF INSTRUMENTS, 1; BANKS AND BANKING; DAMAGES, 7; INSURANCE—FIRE, 6, 7; PLEADING AND PRACTICE, 7.

COSTS.

COSTS INCLUDED IN JUDGMENT ARE ONLY ACCESSORY, and are discharged if the principal debt is discharged; so held as between the parties, not against the attorney. *Clark v. Rowling*, 290.

CO-TENANCY.

1. ONE OF TWO CO-TENANTS WHO REMAIN CO-TENANTS after their other co-tenants have become tenants in severalty by partition, may maintain an action of ejectment against his co-tenant, after a simple denial of his right to participate in the enjoyment of the land, upon the doctrine of constructive ouster, and need not join as defendants, those who have become tenants in severalty. *McMahan v. McMahan*, 481.
 2. CO-TENANT SEEKING TO RECOVER FROM HIS CO-TENANT HIS PORTION of the common property which has been for a time in the possession of the defendant may defalk the profits received by the defendant against the amount of debts paid by the latter for the former. *Id.*
 3. EVERY TENANT IN COMMON IS LIABLE TO ACCOUNT who has been in the enjoyment of the property, but no recovery can be had against him, unless upon taking the account, it is shown that he has received more than his just share. *McPherson v. McPherson*, 416.
 4. TWO TENANTS IN COMMON CANNOT JOIN IN ACTION OF ACCOUNT against their co-tenants, as the interest of tenants in common is several. *Id.*
 5. TENANTS IN COMMON CANNOT BE SUED JOINTLY IN ACTION OF ACCOUNT by their co-tenants, where each of the defendants received portions of the profits severally. *Id.*
 6. TENANT IN COMMON OF FERRY may maintain an action of account or an action on the case against his co-tenant, to recover his share of the income of the ferry, and all damages may be assessed which have arisen *pendente lite*. *Puckett v. Smith*, 686.
- See ACCOUNT, 2; PARTITION; PARTNERSHIP, 8; PLEADING AND PRACTICE, 5, 6; VENDOR AND VENUE, 2.

COVENANT.

1. ACTION OF COVENANT CAN ONLY BE SUSTAINED where the instrument upon which the action is brought has been actually signed and sealed by the party, or by his authority; this is a general principle which is abundantly sustained by the authorities, but is subject to certain exceptions. *Finley v. Simpson*, 252.
 2. *Id.*—INDENTURE OF BARGAIN AND SALE, purporting to be *inter partes*, by which an estate is conveyed to the grantee, is the grantee's deed as well as the deed of the grantor, if the grantee accept it and the estate therein conveyed, although the indenture be not signed and sealed by him; and the grantor can maintain an action of covenant on the instrument against the grantee for breaches of covenants contained in it. *Id.*
- See ESTOPPEL, 2, 3, NEGOTIABLE INSTRUMENTS, 28.

CREDITORS' BILLS.

See BANKRUPTCY AND INSOLVENCY, 3.

CRIMINAL CONVERSATION.

See WITNESSES, 10.

CRIMINAL LAW.

1. FORGERY IS FRAUDULENT MAKING OR ALTERATION of writing to the prejudice of another. *State v. Floyd*, 689.

2. **DISTINGUISHING CHARACTERISTIC OF FORGERY** is the crafty fraud and deceit whereby it is designed to injure some one. *Id.*
3. **ERASING "PART" AND INSERTING "FULL UP TO DATE" IN RECEIPT FOR MONEY IS FORGERY.** *Id.*
4. **IT IS PROPER TO ASK WITNESS, IN TRIAL FOR MURDER,** how he was employed during the few minutes that passed after he and the defendant came out of a house to where the deceased and others were standing, and before the fight took place in which the killing occurred, where the witness had testified as to what happened during that time on his direct examination. *Stewart v. State, 428.*
5. **CONDUCT OF PRISONER BEFORE KILLING** is vitally important to the determination of the case, on a trial for murder in the second degree; it is therefore proper to ask a witness what the employment of the prisoner was from the time that he and the prisoner came out of a house to where the deceased with others was standing till the time the fight began in which the killing occurred. *Id.*
6. **INTENT WITH WHICH DECEASED AND OTHERS WENT TO PRISONER'S HOUSE** on the night of the killing is important; and to ascertain it, it is proper to ask one of the persons who accompanied him as to the conversation that took place amongst them, while they were together, in relation to the subject-matter in dispute, and their purpose in going to the house. *Id.*
7. **OPINIONS OF WITNESSES ARE NOT EVIDENCE** as a general rule; the rule, however, is not universal, and a witness on a trial for murder may be asked whether, when the deceased rushed upon the prisoner, there was time enough for the prisoner to escape and get out of the way or not. *Id.*
8. **WHEN PRECISE WORDS OF DYING MAN ARE STATED** and offered in evidence, the impressions made on the mind of the witness, who was present and heard the statements made by the deceased, cannot be inquired into. *Nelms v. State of Mississippi, 94.*
9. **AFTER DYING DECLARATIONS OF DECEASED HAVE BEEN ADMITTED,** evidence showing what the deceased said at other times, respecting the subject-matter, is competent to impair the credibility of the dying declaration, and all that the deceased said respecting the matter should be presented to the jury. *Id.*
10. **ON APPLICATION TO QUASH INDICTMENT FOR PERJURY, IT IS DISCRETIONARY** whether the court will quash the indictment, or put the party to his plea or demurrer, or leave him to a motion in arrest of judgment. *State v. Dayton, 270.*
11. **PERJURY IS LIMITED EXCLUSIVELY TO OATHS ADMINISTERED IN SOME JUDICIAL PROCEEDING** at the common law. *Id.*
12. **MEANING OF WORD "DEPOSITION," AS USED IN TWENTY-THIRD SECTION OF ACT FOR PUNISHING CRIMES,** is limited to the written testimony of a witness given in the course of a judicial proceeding either at law or in equity, and it is not used as synonymous with "affidavit" or "oath." *Id.*
13. **TAKING OF FALSE AFFIDAVIT IS PERJURY** within the provisions of the act relative to oaths and affirmations: R. S. 871. *Id.*
14. **INDICTMENT NOT FOUND UPON PRODUCTION OF LEGAL AND COMPETENT EVIDENCE** before the grand jury is not essentially vicious, so as to give the defendant a right to have it quashed; the constitutional right of a defendant that he shall be presented by a grand jury does not require that the presentment be founded only upon legal and competent evidence. *Id.*

16. **MATERIALITY OF AFFIDAVIT UPON WHICH PERJURY IS ASSIGNED** must appear with convenient certainty. It may be shown by direct averment, or may appear from the matter shown upon the record. *Id.*
 18. **AFFIDAVIT IS MATERIAL SO AS TO SUSTAIN INDICTMENT FOR PERJURY** under it when taken under an act providing that a certain bank that had suspended shall not resume operations until the affidavit as to its capital had been filed. *Id.*
 17. **FALSE AFFIDAVIT MAY SUSTAIN INDICTMENT FOR PERJURY, THOUGH UN-AVAILING** from other causes, if the oath was material when it was taken. *Id.*
 18. **AFFIDAVIT DIFFERING FROM PHRASEOLOGY OF STATUTE PRESCRIBING** It will, if false, sustain an indictment for perjury where it is identical in meaning with the statute and was filed to comply with the law. *Id.*
 12. **AUTHORITY OF OFFICER TAKING OATH NEED NOT BE AVERRED WITH TIME AND PLACE**, in an indictment of the affiant for perjury, if every material act done to constitute the offense is averred with time and place. *Id.*
 20. **CONCLUSION OF INDICTMENT, WHERE THERE IS MORE THAN ONE STATUTE**, need not be against the form of the statutes. *Id.*
 21. **OBJECTIONS THAT NAME OF JUROR IN CAPTION DID NOT CORRESPOND** with the name in the panel, and that the indictment is averred to have been presented upon the oaths and not upon the oath of the grand jurors, cannot be sustained. *Id.*
- See **JURY AND JURORS**, 3-7; **MARRIAGE AND DIVORCE**, 11; **NEW TRIAL**, 2; **PROCESS**, 4, 5; **SEDUCTION**, 2; **WITNESSES**, 10.

CROSS-EXAMINATION.

See **CRIMINAL LAW**, 4-7; **WITNESSES**, 7.

CUSTOMS.

See **USAGES**.

DAMAGES.

1. **AWARD OF DAMAGES BY COMMISSIONERS FOR INJURIES IN CONSTRUCTING RAILROAD** IS NOT CUMULATIVE, but the result is conclusive, unless an appeal be taken. *Aldrich v. Cheshire Railroad Co.*, 212.
2. **DAMAGES ASSESSED BY COMMISSIONERS** for excavations in land are presumed to include damages for all injuries. *Id.*
3. **PERSON NOT LIABLE AS WRONG-DOER WHEN ACT IS AUTHORIZED BY LEGISLATURE**, the necessary and natural consequence of which is damage to another's property, and the mode in which damage shall be ascertained and compensated is prescribed. *Id.*
4. **MEASURE OF DAMAGES FOR BREACH OF CONTRACT** is the pecuniary loss suffered therefrom. *Eckel v. Murphey*, 607.
5. **LOSS OF COMMERCIAL CREDIT** IS NOT ESTIMATED AS DAMAGES for breach of contract, unless it immediately connects itself with some tangible pecuniary loss of which it was the cause. *Id.*
6. **PARTY INJURED IS ENTITLED TO RECOVER** for all damages previous to trial whenever it can be shown that the injury is continuous in its nature. *Puckett v. Smith*, 686.
7. **WHERE SPECIFIC REMEDY IS PROVIDED BY STATUTE FOR RECOVERY OF DAMAGES** sustained by a person from the construction by a corporation

of a work of internal improvement, he cannot have a common-law action therefor. *McKinney v. Monongahela Nav. Co.*, 517.

See COMMON CARRIERS; CONTRACTS, 5, 6; CORPORATIONS, 27, 28; CO-TENANCY, 6; EXECUTIONS, 5, 10; HIGHWAYS, 8; JURY AND JURORS, 10; MAXIMS, 3; MORTGAGES, 1; NEGOTIABLE INSTRUMENTS, 28; PARENT AND CHILD, 8; SEDUCTION, 2; WASTE, 12; WITNESSES, 11.

DEATH.

See EVIDENCE, 1; PARTNERSHIP, 5, 6; SPECIFIC PERFORMANCE, 2; SURETSHIP, 4.

DECEASED WITNESSES.

See EVIDENCE, 16.

DECLARATIONS.

See AGENCY, 4; CRIMINAL LAW, 8, 9; EVIDENCE, 13, 14, 16, 20; EXECUTIONS, 20; JURY AND JURORS, 9; PARENT AND CHILD, 5, 6; WATERCOURSES, 2.

DECREEES.

See JUDGMENTS.

DEEDS.

1. CONSTRUCTION OF DEED CANNOT BE INFLUENCED BY ANYTHING IN WILL preceding it, which, being inoperative till testator's death, is no evidence of immediate intention, though it might bear on the result. *Hilman v. Bouslaugh*, 474.
2. ACTUAL INTENTION CONTRARY TO LEGAL EFFECT OF DEED, though apparent from that instrument itself, will not affect the operation thereof. *Id.*
3. "PREMISES" IN DEED MEANS ALL THAT PRECEDES HABENDUM. *Brown v. Manter*, 223.
4. HABENDUM'S OFFICE IS NOT TO GRANT ESTATE, but to limit its certainty. *Id.*
5. NOTHING CAN BE LIMITED IN HABENDUM which has not been given in the premises. *Id.*
6. INSTRUMENT VOID AS CONVEYANCE when containing a description in the premises and an *habendum*, but no words of grant, so far as regards the operative power of the premises and *habendum*. *Id.*
7. DEED GOOD IN FORM ONLY is not a sufficient compliance with the covenant to make "a good and perfect deed." *Feemster v. May*, 83.
8. GOOD TITLE IS NECESSARY to make "a good and perfect deed." *Id.*
9. DESCRIPTION IN DEED—PAROL EVIDENCE TO SHOW MISTAKE.—Premises described as fractional north-west quarter of section 35, township 49, range 17, lying partially within the town of B: *Held*, that the section and township description was the principal, and "lying partly within the town of B" the incident, and that parol evidence was inadmissible for the purpose of showing that the south-west quarter was meant, and that there was no fractional north-west quarter-section. *Hart v. Rector*, 157.
10. NOTHING DISHONEST OR BASE IS TO BE PRESUMED IN LAW; all presumptions are innocent and rightful; therefore a deed will not be presumed if it could only be in fraud and injury. *Habersham v. Hopkins*, 676.

11. PLAT REFERRED TO AS BEING ANNEXED TO DEED, though separated, may be given in evidence when shown to be the one referred to. *McCullough v. Wall*, 715.
12. ONLY PARTIES TO DEED CAN QUESTION ITS INTENT OR VALIDITY. *Id.*
13. RECITAL OF PAYMENT OF CONSIDERATION CANNOT BE CONTRADICTED for the purpose of defeating the conveyance in which the recital appears. *Burleigh v. Coffin*, 236.
- See ACKNOWLEDGMENTS; ALTERATION OF INSTRUMENTS, 3, 4; COVENANT; EMINENT DOMAIN, 3; ESTOPPEL, 3; EXECUTIONS, 34, 35; FIXTURES, 1; FRAUDULENT CONVEYANCES, 7; MORTGAGES, 1; PARTNERSHIP, 8; PUBLIC LANDS; SPECIFIC PERFORMANCE, 2; TRUSTS AND TRUSTEES, 2; USES; VENDOR AND VENDEE; WATERCOURSES, 2; WILLS, 3.

DEFINITIONS.

See NEGOTIABLE INSTRUMENTS, 11; PARENT AND CHILD, 4.

DELIVERY.

See EVIDENCE, 9-11; EXECUTIONS, 3; NEGOTIABLE INSTRUMENTS, 3; SALES, 3-9, 15; WITNESSES, 8.

DEMAND.

See NEGOTIABLE INSTRUMENTS, 9, 15, 20.

DEMURRER.

See EQUITY, 1; PLEADING AND PRACTICE, 3.

DEPOSIT.

See BAILMENTS; BANKS AND BANKING, 2.

DEPOSITIONS.

See EVIDENCE, 7; PLEADING AND PRACTICE, 21.

DESCRIPTION.

See DEEDS, 6, 9; NEGOTIABLE INSTRUMENTS, 13; WATERCOURSES, 2.

DEVISES.

See WILLS, 17, 21, 26-30.

DIRECTORS.

See CORPORATIONS, 2-6, 14-16, 28, 33.

DISSOLUTION.

See INJUNCTIONS; MARRIAGE AND DIVORCE, 14; PARTNERSHIP, 2, 3, 5.

DISTRESS.

See LANDLORD AND TENANT, 5.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOMICILE.

See CORPORATIONS, 1, 24.

DOWER.

WHERE MARRIAGE CONTRACT IS SET UP TO DEFEAT WIDOW'S RIGHT OF DOWER, its existence and contents must be clearly proved. *In re Gangwer's Estate*, 554.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, 2.

DYING DECLARATIONS.

See CRIMINAL LAW, 8, 9.

EASEMENTS.

See WATERCOURSES, 7.

EJECTMENT.

See CO-TENANCY, 1; EXECUTIONS, 36, 37; WILLS, 27.

ELECTION.

See LANDLORD AND TENANT, 7; WILLS, 26, 27.

ELECTIONS.

1. STATEMENTS BY COUNTY BOARD OF CANVASSERS, AND CERTIFICATE OF ELECTION GRANTED THEREON, are but *prima facie* evidence of the matters stated in such statements and certificate, and a contestant may go behind such returns, and if necessary, examine the ballots themselves. *People v. Van Olve*, 69.
2. RETURN OF COUNTY BOARD OF ELECTION CANVASSERS NOT BEING CONCLUSIVE, an averment in a plea that it appears therefrom that the defendant had the largest number of votes is immaterial. *Id.*
3. DUTIES OF ELECTION BOARDS BEING MERELY MINISTERIAL, their omissions or mistakes can have no controlling influence on the election. *Id.*
4. IN SHOWING TITLE TO ELECTIVE OFFICE, IT IS SUFFICIENT TO AVER IN PLEA that the election was held, that there was authority to hold it, and that at said election the defendant received the required number of votes. *Id.*

See CORPORATIONS, 16, 20; QUO WARRANTO, 1.

EMINENT DOMAIN.

1. TAKING PRIVATE PROPERTY FOR PRIVATE USE IS NOT AUTHORIZED by the right of eminent domain. *Embury v. Conner*, 325.
2. STATUTE AUTHORIZING TAKING OF PRIVATE PROPERTY BY CONSENT of the owner is valid, notwithstanding the use for which it is taken is private. *Id.*
3. DEED OR WRITTEN DECLARATION OF CONSENT TO TAKING OF LAND is not necessary to effectuate a transfer of the title, by means of proceedings for acquiring it taken under a statute which does not require such deed or writing. The various papers used in the proceedings may be referred to as furnishing evidence of consent in fact. *Id.*

4. **LAND-OWNER IS ESTOPPED, BY ACCEPTING COMPENSATION FOR LAND TAKEN** pursuant to a statute, from afterwards denying that he consented to the taking. *Id.*
5. **POWER OF NEW YORK SUPREME COURT IN PROCEEDINGS TO CONDEMN LANDS**, under the statute, although judicial, is limited to determining the fitness of the persons named as commissioners, the regularity of their proceedings to select the lands required and to estimate the compensation, etc., and the fairness of their assessment; and does not extend to determining whether the title is transferred. Hence this question, when raised in any subsequent litigation, is not concluded by the orders appointing the commissioners and confirming their report. *Id.*
6. **CONSTITUTIONAL RIGHT TO COMPENSATION** for private property taken for public use does not attach where there is no taking of property, but only an indirect or consequential depreciation of its usefulness or value. *Radcliff v. Mayor etc. of Brooklyn*, 357.
7. **RIGHT TO REMOVE DWELLING-HOUSE IS INCLUDED IN RIGHT TO ENTER UPON LAND** and appropriate as much of it as may be necessary for its railroad, granted to the Ohio and Pennsylvania Railroad Company by the Ohio act, adopted by the Pennsylvania act of April, 11, 1848. *Brocket v. O. & P. R. R. Co.*, 534.

EQUITY.

1. **QUESTION TO BE DECIDED ON DEMURRER TO BILL IN EQUITY** is simply whether the facts alleged in the bill would, if true, entitle the party complaining to relief. *Lockwood v. Mitchell*, 438.
 2. **EQUITY WILL RELIEVE AGAINST JUDGMENT OR DECREE OBTAINED BY FRAUD** or circumvention of one of the parties, without the fault or negligence of the other. *Id.*
 3. **MORTGAGEE OBTAINING DECREE OF FORECLOSURE BY FRAUD** for a much larger sum than the amount due, equity will relieve against the decree without a tender of the amount due with legal interest. *Id.*
 4. **EQUITY NOT ONLY CONSIDERS THAT DONE WHICH OUGHT TO HAVE BEEN DONE**, but it also, in many instances, considers that undone which never ought to have been done. *Beck v. Uhrich*, 507.
 5. **SETTLED RULE OF COURT OF EQUITY IN ENGLAND BEFORE REVOLUTION** is obligatory upon the courts here, just as much as any other established rule of property derived from our ancestors, where there is no legislation on the subject, and no repugnancy to our form of government. *Harris v. Harris*, 393.
- See **CONTRACTS**, 9; **CORPORATIONS**, 2, 8, 9-11, 31; **EVIDENCE**, 2; **FRAUD**, 4; **INFANCY**, 2-5; **MAXIMS**; **ORPHANS' COURT**; **PLEADING AND PRACTICE**, 19; **SPECIFIC PERFORMANCE**; **VENDOR AND VENDEE**, 4, 7; **WILLS**, 26; **WITNESSES**, 3.

ERROR.

See **PLEADING AND PRACTICE**.

ESTATES AT WILL.

See **LANDLORD AND TENANT**, 1, 2.

ESTATES FOR LIFE.

See **WASTE**; **WILLS**, 16, 21.

ESTATES OF DECEDENTS.

HEIR IS ENTITLED TO INTEREST ON HIS SHARE from time when distribution was made to the other legatees, and ought to have been made to him. *Fund's Appeal*, 496.

See **EXECUTORS AND ADMINISTRATORS**, 4; **MORTGAGES**, 2.

ESTATES-TAIL.

See **WILLS**, 16, 28.

ESTOPPEL.

1. **ADMISSIONS WHICH HAVE BEEN ACTED UPON BY OTHERS ARE CONCLUSIVE** against the party making them, and will bar every attempt to erect a defense upon their alleged falsity. *McMahan v. McMahan*, 481.
2. **COVENANT OF WARRANTY MAY OPERATE AS ESTOPPEL BY WAY OF REBUTTER**, where an instrument, void as a conveyance for want of words of grant, contains such covenant, with the names of covenantor and covenantee, and a description of the land. *Brown v. Manter*, 223.
3. **GRANTOR IN DEED IS NOT ESTOPPED, BY COVENANT AGAINST INCUMBRANCES**, from showing, in an action against the grantee, that the deed was given by him and accepted by the grantee, subject to the lien and incumbrance of a mortgage, and upon an express verbal stipulation between the parties, that the grantee, in consideration of the delivery of the deed, would assume the payment of the mortgage and indemnify the grantor against it. *Bolles v. Beach*, 263.
4. **LESSOR IS NOT ESTOPPED TO DENY TITLE IN LESSOR** when, during the lease, the premises are sold under execution against the lessor and the lessee becomes the purchaser. *Dea ex dem. Murrell v. Roberts*, 419.
5. **PURCHASER OF ESTATE AFTER JUDGMENT LIEN THEREON HAS EXPIRED** is not estopped from showing title in himself by failure to appear to a *scire facias* upon such judgment. *Dengler v. Kichner*, 441.
6. **ANCESTOR'S AGREEMENT NOT WORKING ESTOPPEL ON HEIRS.**—T., a debtor, applied to M., his creditor, to purchase a piece of land at sheriff's sale, and to give him further time to redeem it in. The creditor agreed, and purchased accordingly. The debtor died. Defendants came in under him. No offer to redeem the land had been made. *Held*, that defendants were not estopped to dispute plaintiff's title in an action of ejectment. *Maples v. Tunis*, 779.

See **DEEDS**, 13; **EMINENT DOMAIN**, 4; **EXECUTIONS**, 24, 30, 36; **INSANITY**, 1; **JUDGMENT**, 7; **VENDOR AND VENDEE**, 5, 6.

EVIDENCE.

1. **RULE AS TO PRESUMPTION OF DEATH** is that it arises from the absence of the person from his domicile without being heard of for seven years; but it seems rather to be the current of authorities that the presumption is only that the person is then dead, namely, at the end of the seven years, and does not extend to the death having occurred at the end or any other particular time within that period, but leaves it as a matter of fact whether it was at an earlier or a later day. *State v. Moore*, 401.
2. **RESPONSIVE ANSWER IN EQUITY IS EVIDENCE OF ALLEGED FACTS**, requiring testimony to rebut it; but if not responsive, it is not evidence of facts alleged, and must be proved. *Com. ex rel. Claghorn v. Cullen*, 450.

3. UNDISPUTED CORRESPONDING LINE IS COMPETENT EVIDENCE to settle a line in dispute. *Gibson v. Poor*, 216.
4. PLAN OR SURVEY WITHOUT DATE may be admitted in evidence. *Id.*
5. ANCIENT DOCUMENT MAY BE READ IN EVIDENCE when absence from its proper place is satisfactorily accounted for and suspicions against its genuineness removed. *Id.*
6. GENUINENESS OF ANCIENT TOWN PLAN WITHOUT DATE may be shown by evidence that a town clerk of more than thirty years before, from whom it was obtained, had then kept it among the records, and that its draftsman had previously been appointed to survey the town. *Id.*
7. DEPOSITION IS INCOMPETENT EVIDENCE when the words "before me," in the caption, preceding the name of the magistrate before whom the deposition purported to be taken and sworn, were omitted. *Powers v. Shepard*, 168.
8. MERCHANT'S BOOKS, WHERE PASS-BOOK IS KEPT, or where goods are delivered on another's order, are not admissible in evidence unless the absence of the pass-book or order is explained. *Thomson v. Porter*, 653.
9. WHERE MERCHANT'S ENTRIES ARE MADE UPON CLERK'S STATEMENT, the latter only can prove delivery of the goods. *Id.*
10. MERCHANT'S BOOKS, TO BE EVIDENCE OF SALE AND DELIVERY, must contain the original entries, which must be such as are usually made in the course of business. *Id.*
11. BOOK ENTRIES BY DECEASED COPARTNER may be proved to have been made by him in the usual course of business, and this raises a presumption of sale and delivery, and will prevail *pro tanto* unless rebutted. *Id.*
12. DOCUMENT FORMING PART OF RES GESTÆ and conducing to illustrate the case is admissible in evidence. *Beck v. Ulrich*, 507.
13. DECLARATIONS OF BY-STANDERS AT SHERIFF'S SALE ARE ADMISSIBLE as part of *res gestæ*, in a question of fraud, when they show that the purchaser's professions affected the bidding. *Walter v. Gernant*, 491.
14. AFTER PROOF OF COMBINATION BETWEEN PARTIES, the acts or declarations of one are evidence against the others. *Trimble v. Turner*, 90.
15. VOLUNTARY ADMISSIONS MADE BY WITNESS AGAINST HIS INTERESTS of an act subjecting him to infamy and punishment will be admissible as evidence of a fact between third persons. *Coleman v. Frasier*, 727.
16. DECLARATION BY DECEASED WITNESS MADE IN PRESENCE OF DEFENDANT is admissible as evidence against the defendant. *Id.*
17. ADMISSION BY ONE OF TWO OR MORE CO-PLAINTIFFS OR CO-DEFENDANTS, if they have a joint interest in the suit, is in general evidence against all. *Hurst v. Robinson*, 134.
18. PAROL EVIDENCE IS ADMISSIBLE TO PROVE CONTRACT OF WARRANTY not contained in a bill of sale and receipt. *Hersom v. Henderson*, 185.
19. PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN WRITTEN CONTRACT by which a miller agrees to do two hundred dollars' worth of grinding for the plaintiff, where the contract contains no terms on which the grinding was to be done, and to show whether the parties were governed by the stipulations contained in a previous similar agreement between them. *Inglebright v. Hammond*, 430.
20. EVIDENCE OF ORAL BARGAIN PRIOR TO WRITTEN CONTRACT, or of contemporaneous or subsequent declarations, is inadmissible to affect the contract. *Davis v. Ball*, 53.

21. WORDS "MADE USEFUL" DO NOT CONSTITUTE LATENT AMBIGUITY in a written contract by a dentist who manufactured a set of teeth, warranting them for one year, and providing that "if on trial they cannot be made useful," they may be returned and the money refunded; and parol evidence is inadmissible to explain those words, but they are to be construed as meaning that the teeth are to be returned if the purchaser cannot make them useful on trial. *Id.*
 22. EVIDENCE TO BE REBUTTING MUST APPLY DIRECTLY to the matter in controversy, should disprove the particular facts attempted to be shown by the other side, and must not introduce new matter. *Foye v. Leighton*, 231.
- See ACKNOWLEDGMENTS, 2; AGENCY, 4, 5; ALTERATION OF INSTRUMENTS, 1; CORPORATIONS, 37; CRIMINAL LAW, 4-9, 14; DEEDS, 9, 11; DOWER; ELECTIONS, 1; EMINENT DOMAIN, 3; EXECUTIONS, 34; FRAUD, 1; GUARANTY, 1; HIGHWAYS, 4; INSANITY, 1; MARRIAGE AND DIVORCE, 10; NEGOTIABLE INSTRUMENTS, 29; NEW TRIAL; PARENT AND CHILD, 8; PARTNERSHIP, 8-10; PLEADING AND PRACTICE, 3, 11, 12, 15, 20, 21; USAGE; WATERCOURSES, 2; WITNESSES.

EXAMINATION AND CROSS-EXAMINATION.

See CRIMINAL LAW, 4-7; WITNESSES, 7.

EXCEPTIONS.

See PLEADING AND PRACTICE, 15-17, 21.

EXECUTIONS.

1. MONEY IN HANDS OF SHERIFF IS NOT SUBJECT TO LEVY, as it is in the custody of the law. *Ex parte Fearle & Lewis*, 155.
2. MONEY COLLECTED BY SHERIFF UNDER EXECUTION in favor of one against whom he also holds an execution may be applied by him towards the satisfaction of said second execution, unless the legal or equitable title has passed to some third person. *Id.*
3. LEVY OF EXECUTION SHOULD HAVE SUFFICIENT CERTAINTY AND PUBLICITY; and for the purpose of a sale and consequent delivery, the officer should have the property actually or constructively under his control. *Princeton Bank v. Crozer*, 254.
4. SHERIFF IN LEVYING UPON CAPITAL STOCK OF BANK should inform the defendant, if within his jurisdiction, that he takes his stock under the writ; and also, by giving notice of his execution at the bank and requiring a certificate of the stock, obtain control over the shares and demonstrate his intention to appropriate them; merely entering upon an inventory of the property levied on "six shares capital stock," without informing the defendant that he had levied upon his stock, or seeking a delivery over of his certificate, is insufficient. *Id.*
5. SHERIFF IS BOUND TO EXECUTE WRIT OF FIERI FACIAS within a reasonable time, and in default he is liable for any damage which plaintiffs sustain by reason of his negligence or refusal. *Farrar v. Wingate*, 709.
6. INDORSEMENT ON FIERI FACIAS, "STAY OF SALE ONLY," applies only to the sale, and a failure on the part of the sheriff to make a levy will render him liable for neglect. *Id.*
7. "STAY OF SALE" WILL SOMETIMES IMPLY STAY OF LEVY; but when the sheriff is especially instructed to proceed and levy immediately, he should

- obey the instruction, and his omission to do so within a reasonable time is a neglect of duty. *Id.*
8. **EXECUTION OF FIERI FACIAS CONSISTS PROPERLY OF TWO ACTS:** levy, or taking the goods into the hands of the sheriff for sale; and the sale itself. Either or both of these acts are within the control of the plaintiff in execution. *Id.*
 9. **WHERE PROPERTY LEVIED ON BY CONSTABLE IS CLAIMED BY STRANGER** to the writ, the officer is not bound to proceed further with the execution of his writ; but when he has demanded and accepted such indemnity, he is bound to proceed and rely on his bond for indemnity. *Corson v. Hunt*, 568.
 10. **MEASURE OF DAMAGES IN ACTION AGAINST CONSTABLE FOR FALSE RETURN** is the value of the property, when such value is not equal to the amount of the debt. *Id.*
 11. **EXECUTION CREATES NO LIEN ON SLAVES NOT WITHIN COUNTY**, and does not affect the debtor's right to dispose of them. *Blanton v. Morrow*, 391.
 12. **INTEREST OF REMAINDERMAN IS SUBJECT TO BE SOLD UNDER EXECUTION**; but the property, if personalty, must be present at the sale in order to render it valid. *Id.*
 13. **SHERIFF'S SALE DEVOID OF GOOD FAITH IS VOID.** *Trimble v. Turner*, 90.
 14. **THERE CAN BE NO PUBLIC SALE WITHOUT BIDDERS OR BY-STANDERS.** *Ricketts v. Unangst*, 572.
 15. **EXECUTION SALE AT WHICH ONLY SHERIFF OR SHERIFF AND PLAINTIFF ARE PRESENT**, and the property is sold to the plaintiff, transfers no title. *Id.*
 16. **PROPERTY TAKEN IN EXECUTION MUST BE DISPOSED OF BY PUBLIC** and not by private sale, which is, in such case, at least constructively fraudulent. *Keyser's Appeal*, 487.
 17. **INDORSEMENT ON EXECUTION, "THIS LEVY AT RISK OF PLAINTIFF,"** means that the property may be left with the defendant until sale, at the risk of plaintiff, and not at the risk of the sheriff. *Id.*
 18. **LEAVING PROPERTY LEVIED ON IN POSSESSION OF DEFENDANT**, with the plaintiff's consent, does not *per se* divest the execution lien, in the absence of fraud. *Id.*
 19. **PRIOR EXECUTION WILL BE POSTPONED TO SUBSEQUENT EXECUTIONS** when the property levied upon, or a portion thereof, is sold under the prior execution at private sale, without the consent of the subsequent execution creditors, which cannot be inferred from the indorsement "at plaintiff's risk," on such subsequent executions. *Id.*
 20. **WHERE IT APPEARS THAT PUBLIC FORCED SALE** is but the consummation of an agreement made between the judgment creditor and a third party, who bought for the benefit of the judgment debtor, and suffered the property to remain in the possession of the judgment debtor, who paid the price when the same fell due, such sale will be considered fraudulent as to creditors, and the property purchased will be subject to the other debts of the judgment debtor. *Trimble v. Turner*, 90.
 21. **WHEN PERSONS ARE PREVENTED FROM BIDDING AT PUBLIC FORCED SALE**, by the purchaser or persons acting under him, upon representations that the property is to be bought for the benefit of the judgment debtor, such sale will be deemed fraudulent as to creditors of the judgment debtor. *Id.*

22. **PURCHASER AT SHERIFF'S SALE**, who stands in the relation of attorney in fact to both debtor and creditor, is estopped from purchasing, for his own benefit, the property offered at such sale, on the principle that such purchase is against public policy. *White v. Trotter*, 112.
23. **MORTGAGEE OF PROPERTY DISPOSED OF AT SHERIFF'S SALE** has the right to have such sale set aside when it is void as to both debtor and creditor. *Id.*
24. **WHERE JOINT OWNER OF CHATTEL SUES SHERIFF TO RECOVER HIS PORTION** of the balance of the proceeds of a sale of it, made under an execution against some only of the joint owners, an averment of the sheriff in his return that he has paid over the money in contest to one of the owners and agent for the others, is not a legitimate part of the return, and does not estop the plaintiff from showing the truth. The plaintiff's remedy, in such a case, is not by an action for a false return. *Hopkins v. Forsyth*, 513.
25. **FACT THAT BOAT'S HUSBAND HAS POWER TO SELL WHOLE OF HER** does not authorize the sheriff to do the same under an execution against him, nor to do more than to sell his share as a part owner. *Id.*
26. **UNDER EXECUTION AGAINST SOME OWNERS OF CHATTEL SHERIFF MAY SELL** the interests of other owners who consent that their shares may be sold, and the parties so consenting may claim their shares of the proceeds of the sale. But other owners, who were not parties to the judgment on which the execution issued, retain their interests, and cannot claim any part of the proceeds of the sale. *Id.*
27. **LEAVING PROPERTY PURCHASED AT SHERIFF'S SALE IN POSSESSION OF FORMER OWNER** for his use, or even for his consumption, is not fraudulent; but if the purchaser falsely declare that he is buying for the family, or to sell again at an advanced price for the benefit of the creditors, the property will remain with the debtor, subject to subsequent executions against the debtor. *Walter v. Gernant*, 491.
28. **PROPERTY BOUGHT IN AT SHERIFF'S SALE WITH DEBTOR'S MONEY** is subject to subsequent executions against the debtor. *Id.*
29. **TEMPORARY POSSESSION BY EXECUTION DEFENDANT OF PREMISES SOLD UNDER EXECUTION** is not such an adverse possession as will defeat action of replevin brought by the purchaser at the sale to recover fixtures removed by the party in possession. *Harlan v. Harlan*, 612.
30. **DECLARATIONS OF PLAINTIFF IN EXECUTION**, who afterwards became the purchaser, disclaiming title to fixtures on the land sold under execution, do not estop him from asserting title to the fixtures in an action of replevin therefor, if his declarations were made in ignorance of his rights and with no intention to relinquish his own property. *Id.*
31. **PAYMENT TO SHERIFF DISCHARGES EXECUTION.** *Murrell v. Roberts*, 419.
32. **SUBSEQUENT SALE UNDER SATISFIED EXECUTION IS VOID**, and the purchaser at such a sale obtains no title. *Id.*
33. **SALE OF GOODS UNDER EXECUTION IS SATISFACTION** of the *fi. fa.*, even though the goods do not belong to the judgment debtor, and though the real owner afterwards recover the value of them from the sheriff and judgment creditor. *Jones v. Burr*, 699.
34. **SHERIFF'S DEED IS ADMISSIBLE, WITHOUT JUDGMENT AND EXECUTION** upon which it is founded, to show the amount of money raised by the sheriff. *Bolles v. Beach*, 263.

85. PLAINTIFF IN EXECUTION SEEKING TO ESTABLISH SHERIFF'S DEED, under which he claims, must produce not only a copy of the decree, but also the bill and answer, and so much of the pleadings and orders as would show that the decree was pronounced in a cause properly constituted between the parties. *Den ex de. Lysterly v. Wheeler*, 414.
86. IN EJECTMENT BROUGHT BY PURCHASER AT SHERIFF'S SALE against the defendant in the execution, the latter, while still in possession, cannot resist upon the ground that he, the defendant, has acquired a better title. *Id.*
87. PURCHASER ACQUIRES WHATEVER POSSESSION DEFENDANT IN EXECUTION HAD, and is entitled to recover it in an action of ejectment. *Id.*
- See ACCESSION, 2; ATTACHMENTS, 3; ATTORNEY AND CLIENT, 3; ESTOPPEL, 4, 6; EVIDENCE, 13; FIXTURES, 1; INSURANCE—FIRE, 5; JUDGMENTS, 7; JURY AND JURORS, 9; NEGOTIABLE INSTRUMENTS, 7; SHIPPING, 2; STATUTE OF LIMITATIONS, 4; WITNESSES, 11.

EXECUTORS AND ADMINISTRATORS.

1. SALE OF PROPERTY BY ADMINISTRATOR IS VOID where the sale was made by virtue of an order obtained in due time, but not acted upon until the statute of limitations had run against the debts which made such sale necessary. *Campan v. Gillett*, 73.
2. SALE BY ADMINISTRATOR UNDER ORDER OF COURT IS VOID, where the law empowering the court to make said order is repealed after the order has been granted, but before the sale has been made. *Id.*
3. PRESUMPTION OF TITLE ARISING FROM POSSESSION.—Where one claims and holds lands through an executor, and such lands are co-extensive with the grant to the deceased, the authority of the executor to convey will be presumed without the production of the will. *McCullough v. Wall*, 715.
4. ONE OF SEVERAL ADMINISTRATORS MAY PURCHASE AT SALE of real estate made by them, subject, however, to the power of disaffirmance in the heirs or creditors. But the other bidders at the sale cannot disaffirm the sale to such administrator, and a bid made by him may be *bona fide*. *Pennock's Appeal*, 561.
5. INTEREST ON SUMS ASCERTAINED TO BE IN EXECUTOR'S HANDS will not be suspended pending the examination of their account. *Yundt's Appeal*, 496.
6. NEXT OF KIN CANNOT HAVE ACTION ON ADMINISTRATION BOND where the administrator has not administered the estate, but the right to call him to account and to put the bond in suit is vested in the administrator *de bonis non*. *State v. Moore*, 401.

See PARTNERSHIP, 6; SURETYSHIP, 1, 2, 4; WILLS, 24.

EXEMPTIONS.

See COMMON CARRIERS, 1.

FEMES COVERT.

See MARRIED WOMEN.

FENCES.

See WASTE, 10.

FERRIES.

See CO-TENANCY, 6.

FISHERY.

See WATERCOURSES, 7.

FIXTURES.

1. **MACHINERY OF COTTON OR WOOLEN MANUFACTORY** which is necessary to constitute it is a part of the freehold, and as such will pass by deed of the vendor conveying the land on which the manufactory stands, or by the deed of the sheriff who sells the real estate of the owner under execution. *Harlan v. Harlan*, 612.
2. **FIXTURE WRONGFULLY DETACHED FROM FREEHOLD BECOMES PERSONAL PROPERTY OF OWNER OF SOIL**, and he may, in general, maintain trover or replevin for the same. *Id.*
3. **TROVER OR REPLEVIN FOR FIXTURES REMOVED WILL NOT LIE** against one in actual adverse possession of the land and claiming title thereto. *Id.*
See EXECUTIONS, 29, 30.

FORECLOSURE.

See EQUITY, 3; LANDLORD AND TENANT, 6.

FORFEITURE.

See CORPORATIONS, 34, 36; WASTE, 11; WILLS, 27.

FORGERY.

See CRIMINAL LAW, 1-3; NEGOTIABLE INSTRUMENTS, 26.

FRANCHISES.

See CORPORATIONS, 34-36; INSURANCE—FIRE, 6, 7.

FRAUD.

1. **FRAUD MAY BE PROVED BY DIRECT OR CIRCUMSTANTIAL OR PRESUMPTIVE EVIDENCE**, but the proof must in all cases be satisfactory. *White v. Trotter*, 112.
 2. **WHEREVER CONFIDENCE IS REPOSED**, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage. *Id.*
 3. **IT SEEMS THAT ALLEGATION OF IGNORANCE OF FRAUD** until within four years, on the part of plaintiff, throws the burden of proof of his knowledge before that time on the defendant. *Throver v. Cureton*, 660.
 4. **RULE IN CASES AT LAW, THAT PARTY MUST LOSE ALL ADVANTAGES GAINED BY FRAUD**, as well as the money which may have been paid by him, does not apply in equity when the party asking to set aside a purchase has been benefited by the discharge of incumbrances or the payment of debts. *White v. Trotter*, 112.
- See ALTERATION OF INSTRUMENTS, 3; BAILMENTS; CORPORATIONS, 2, 3; DEEDS, 10; EQUITY, 2, 3; EVIDENCE, 13; EXECUTIONS, 17, 18, 20, 21, 27; FRAUDULENT CONVEYANCES; INSURANCE—FIRE, 3, 4; JUDGMENTS, 13, 14; JUDICIAL SALES, 3; SALES, 11, 12, 14; STATUTE OF LIMITATIONS, 4.

FRAUDULENT CONVEYANCES.

1. FRAUDULENT CONVEYANCES ARE VOID. *Trimble v. Turner*, 90.
2. ASSIGNMENT OF PERSONAL PROPERTY WITHOUT ACTUAL TRANSFER OF POSSESSION gives no title to the assignee against the creditors of the assignor. And where there is a conflict of testimony as to the change of possession, the question should be left to the determination of the jury. *Forsyth v. Matthews*, 522.
3. SALE MADE FOR PURPOSE OF DEFRAUDING CREDITORS IS VOID, even though there be a transfer of possession; but whether or not a transfer was made with intent to defraud, is a question to be left to the jury. *Id.*
4. TRANSFER TO FATHER OF HIS CHILD'S PERSONAL PROPERTY, when the latter is deeply indebted, naturally arouses suspicion of fraud, but is not *per se* proof of fraud; and the effect to be legitimately inferred from it, it is the province of the jury to deduce. *Id.*
5. FACT THAT PERSONAL PROPERTY IS TRANSFERRED BY FORMAL INSTRUMENT in writing, is not a matter of much importance in determining whether or not there is fraud in the transaction. *Id.*
6. WHEN TWO CREDITORS INSTITUTE PROCEEDINGS TO SET ASIDE FRAUDULENT CONVEYANCE, and obtain judgment, the property will be decreed to satisfy the prior lien first, and if the creditor having the latest judgment has a mortgage on the same property for the same debt, which was secured prior to either judgment, his lien of mortgage will be preferred to the judgments. *Trimble v. Turner*, 90.
7. DEED OR OTHER INSTRUMENT OR TRANSACTION WHICH IS SET ASIDE BECAUSE OF FRAUD as to existing creditors becomes wholly void, and cannot stand in the way of subsequent judgment creditors. *Id.*
8. SALE WHICH APPEARS DOUBTFUL OR SUSPICIOUS cannot be set aside as fraudulent in fact until such fact be established. *White v. Trotter*, 112.
9. CONTRACT IS DEEMED FRAUDULENT which gives one creditor preference over others, if the party to be benefited by the contract knew of the insolvency of the obligor. This knowledge must be shown by the party who attacks the contract. *Id.*

See EXECUTIONS, 20, 27; SALES, 11.

GIFTS.

POSSESSION, TO TAKE PAROL GIFT OF LANDS OUT OF STATUTE OF FRAUDS, must be taken in pursuance of the gift. If taken before the alleged gift, it will not have that effect. *Christy v. Barnhart*, 538.

See PARENT AND CHILD, 4.

GRAND JURY.

See CRIMINAL LAW, 14, 21.

GRANTS.

See ADVERSE POSSESSION, 2; PUBLIC LANDS, 2.

GROWING TREES.

See TRESPASS, 4; WASTE.

GUARANTY.

1. **GUARANTIES ARE SUBJECT TO SAME RULES OF CONSTRUCTION**, evidence, and sufficiency of consideration, as are applied to other contracts, except that (in New York) the statute of frauds requires that they should be in writing, subscribed by the party to be charged, and expressing the consideration. *Union Bank v. Oster*, 280.
2. **CONSIDERATION EXPRESSED IN PRINCIPAL CONTRACT WILL SUSTAIN GUARANTY** of performance of it, whereof both are in tribute and are given as parts of the same transaction. *Id.*
3. **GUARANTY WRITTEN UPON LETTER OF CREDIT**, and delivered with it, engaging that drafts to be drawn upon the faith of the letter shall be paid, sufficiently expresses the consideration; for the letter may be read with the guaranty, and when so read, shows that the money or other value to be given for the drafts is the consideration. *Id.*
4. **NOTICE OF ACCEPTANCE OF GUARANTY** absolute in its terms need not be given, in order to charge the guarantor. *Id.*
5. **GENERAL LETTER PURPORTING TO AUTHORIZE OPEN AND CONTINUED CREDIT** is not limited to dealings with a single individual, but may be presented to several; and each of those who made advances on the faith of it (until any amount to which it is limited is reached) is entitled to sue upon it for reimbursement. *Id.*

See STATUTE OF FRAUDS, 2.

HABEAS CORPUS.

See WITNESSES, 12.

HABENDUM.

See DEEDS, 3-6.

HEIRS.

See ESTATES OF DECEASED; ESTOPPEL, 6; EXECUTORS AND ADMINISTRATORS, 4, 6; WILLS, 18, 22, 28.

HIGHWAYS.

1. **NON-RESIDENT INJURED BY DEFECTIVE HIGHWAY MAY SUE TOWN IN ANY COUNTY** in the state, under the revised statutes of Massachusetts. *Raymond v. City of Lowell*, 57.
2. **FOOT-PASSENGER HAS RIGHT TO CROSS STREET AT ANY POINT**, and is not restricted to the regular crossings. *Id.*
3. **TOWN IS BOUND TO KEEP SPACE BETWEEN SIDEWALK AND CARRIAGE-WAY** in its streets in a reasonably safe condition to permit foot-passengers to cross, and is liable for an injury from a defect therein to one using due care, but it is not bound to keep the entire space along the sidewalk in an equally safe condition. *Id.*
4. **TESTIMONY OF WITNESSES AS TO CONDITION OF STREETS IN OTHER TOWNS** in the vicinity with respect to the inequalities, elevations, and depressions in the space between the sidewalk and the carriage-way is admissible, as bearing on the question of ordinary care, in an action against a town for an injury from a defect in that part of the street; but testimony that such space in other towns is not regarded as part of the highway requiring to be repaired is inadmissible. *Id.*

5. **LIABILITY OF TOWNS TO KEEP ROADS IN REPAIR IS STATUTORY**, and the statute in Massachusetts applies equally to cities and towns. *Id.*
6. **TOWN IS BOUND ONLY TO ORDINARY CARE IN KEEPING STREETS** in safe condition for travelers, and not to the highest possible care. *Id.*
7. **ELEVATION OF TWO INCHES ABOVE SIDEWALK OF GRATING** over a drain at the edge of the sidewalk, upon which a foot-passenger trips in the daytime, and is injured while crossing the street at that point, there being nothing to prevent his seeing the obstruction, and no particular reason for his crossing there, is not such a defect as to render the town liable for the injury, considering the plaintiff's own want of ordinary care. *Id.*
8. **EXCESSIVE DAMAGES AWARDED FOR INJURY** from a defective highway, plainly showing that the jury was carried away by sympathy for the person injured, are ground for setting aside the verdict; as where ten thousand dollars were allowed for an injury to the plaintiff's leg, whereby it was permanently weakened, but not entirely disabled so as to prevent his going about and performing some labor. *Id.*
9. **PARTY INJURED BY DEFECT IN HIGHWAY WHILE NOT EXERCISING ORDINARY CARE** cannot recover against the town liable for the defect, unless the defect was the sole cause of the injury, and the burden of proving due care on his part is upon him. *Id.*
10. **ALLEGATION OF DUE CARE BY ONE INJURED BY DEFECTIVE HIGHWAY** is sufficient after verdict where it is to the effect that the injury occurred while the plaintiff was walking along the highway "in the due prosecution of his business and in a proper manner." *Id.*

See **ANIMALS**, 3; **CORPORATIONS**, 40; **WATERCOURSES**, 7.

HOLIDAYS.

See **MARRIAGE AND DIVORCE**, 16.

HUSBAND AND WIFE.

1. **RIGHTS OF HUSBAND OVER WIFE'S PROPERTY.**—The husband is the absolute owner of all the wife's personal property, and of such choses in action as he reduces to possession, and of all the rents and profits of her estates; he has a life estate in her lands, and is liable for her debts. *Burleigh v. Coffin*, 236.
2. **HUSBAND CANNOT CHARGE WIFE'S ESTATE** with the labor, services, and expenses incurred in making improvements upon it, nor for money expended in defending her title to it. *Id.*

See **MARRIED WOMEN**; **WITNESSES**, 9, 10.

IDEM SONANS.

See **NAMES**.

ILLEGAL CONTRACTS.

See **BANKRUPTCY AND INSOLVENCY**, 4, 5; **CONTRACTS**, 3, 4, 9-19; **MARRIAGE AND DIVORCE**, 14, 15.

IMPEACHMENT OF WITNESSES.

See **WITNESSES**, 12-16.

IMPROVEMENTS.

See CORPORATIONS, 40; HUSBAND AND WIFE, 2; WATERCOURSE, 7.

INCUMBRANCES.

See ESTOPPEL, 3; VENDOR AND VENDEE, 6, 7.

INDEMNITY.

See EXECUTIONS, 9; NEGOTIABLE INSTRUMENTS, 7.

INDEPENDENT COVENANTS.

See VENDOR AND VENDEE, 1.

INDICTMENT.

See CRIMINAL LAW, 10, 14, 15, 16-21.

INDORSEMENT.

See CORPORATIONS, 5; EXECUTIONS, 6, 7, 17, 19; NEGOTIABLE INSTRUMENTS, 2-9, 16, 18-26

INFANCY.

1. INFANT MAY BIND HIMSELF BY CONTRACT CLEARLY BENEFICIAL to him. *Williams v. Hutchinson*, 301.
2. COURTS OF EQUITY HAVE GENERAL JURISDICTION TO DISPOSE OF INFANT'S LANDS for their benefit in this state. *Doe d. Williams v. Harrington*, 421.
3. DECREE OF COURT OF EQUITY ORDERING SALE OF INFANT'S LANDS CANNOT BE QUESTIONED in another court, although there may have been irregularity or even error in the decree. *Id.*
4. DEFECT IN DECREE OF COURT OF EQUITY FOR SALE OF INFANT'S LAND as to the certainty of the land is cured by the subsequent proceedings taken in the sale, and the ratification of the sale, whereby it appears that there could not have been a mistake as to the identity of the land intended and ordered to be sold and that actually sold. *Id.*
5. SUBSTITUTION OF ONE BIDDER FOR ANOTHER on a sale under a decree in equity of an infant's land by the express leave of the court, and after payment of the whole price, is proper. *Id.*
6. WHERE INFANT AGAINST WHOM JUDGMENT HAS BEEN RECOVERED APPEARED BY ATTORNEY, he may, upon motion, when he becomes of age, have the same set aside. *Powell v. Gott*, 153.
7. JUDGMENT ENTERED AGAINST INFANT is not an irregularity, but an error. *Id.*

See PARENT AND CHILD.

INJUNCTIONS.

MOTION TO DISSOLVE INJUNCTION WILL BE REFUSED, and the injunction will be continued till the hearing, where it was granted to restrain the defendants from working gold mines claimed by the defendant, and when, if the facts are as stated by the defendants, the injunction could do them no harm, but if the truth is as averred by the plaintiffs, the dissolution of the injunction would work them a serious injury. *McBrayer v. Hardin*, 389.

INQUISITION.

See INSANITY, 1.

INSANITY.

1. **INQUISITION OF LUNACY FINDING PERSON TO BE OF UNSOUND MIND**, and that he has been in the same state for a specified time prior to the finding, is *prima facie* but not conclusive evidence of the facts therein found. The petitioner in such proceeding is not estopped from asserting the truth against the finding, and showing that the person had lucid intervals. *In re Gangwere's Estate*, 554.
2. **ACT DONE IN LUCID INTERVAL** by one who has been found to be a lunatic is binding on him, when the proof of the lucid interval in which it was done is clear. *Id.*

INSOLVENCY

See BANKRUPTCY AND INSOLVENCY.

INSTALLMENTS.

See VENDOR AND VENDEE, 1.

INSTRUCTIONS.

See PLEADING AND PRACTICE, 9-13, 16, 22.

INSURANCE—FIRE.

1. **DEFECT OR INSUFFICIENCY OF NOTICE TO INSURANCE COMPANY OF LOSS IS WAIVED**, where the fact of the loss is communicated, but not in the manner required by the by-laws of the company, and no objection is made to the form of the notice, but there is an absolute refusal to pay on other grounds. *Clark v. N. E. M. F. I. Co.*, 44.
2. **ALIENATION OF ONE OF TWO HOUSES INSURED IN SAME POLICY**, but valued and insured separately, avoids the policy only as to the house so alienated, where the charter of the company provides that the "alienation of any property" shall avoid the "policy thereupon." *Id.*
3. **MISREPRESENTATION BY ASSURED THAT INSURED PROPERTY IS NOT INCUMBERED**, in answer to a direct interrogatory on that point in the application, renders the policy void. *Id.*
4. **PRIOR POLICY IS NOT AVOIDED BY SUBSEQUENT VOID INSURANCE** obtained from another company upon the same property without notice to the prior insurers, where the charter of the first company provides that "other insurance," without notice and consent on the company's part, shall avoid its policies; as where the second policy is vitiated by a material misrepresentation in the application. *Id.*
5. **LEVY OF EXECUTION ON INSURED PROPERTY IS NOT ALIENATION** avoiding the insurance, under a provision in the charter against alienation, where a right of redemption still remains to the assured. *Id.*
6. **INSURANCE CORPORATION MAY BORROW MONEY, RECEIVE DEPOSITS**, and draw or purchase drafts or checks in its proper business in exercising powers incidental to the use and enjoyment of its franchise. *Ohio L. I. & T. Co. v. M. I. & T. Co.*, 742.
7. **INSURANCE COMPANY CANNOT DO BANKING BUSINESS** where the franchise is a grant of powers as an insurance and trust company only. *Id.*

INTEREST.

1. ACT CHANGING RATE OF INTEREST OPERATES ONLY ON CONTRACTS MADE and debts incurred after the law went into operation. *North R. M. Co. v. Shrewsbury Church*, 258.
 2. INTEREST ON ASSESSMENT CANNOT BE RECOVERED UNDER COUNT FOR MONEY LOANED, as to support a count for money loaned there should have been a loan of money. *Id.*
 3. INTEREST IS RECOVERABLE WHEN INDEBTEDNESS IS FOUNDED ON MONEY TRANSACTION, as where money is lent or advanced for the use of another, or had and received for another's use. *Atlin v. Peay*, 684.
- See EQUITY, 3; ESTATES OF DECEDENTS; EXECUTORS AND ADMINISTRATORS, 5; JURY AND JURORS, 10; PARENT AND CHILD, 7; WITNESSES, 11.

ISLANDS.

See WATERCOURSES, 3, 4.

JOINDER OF ACTIONS.

See CO-TENANCY, 4, 5.

JOINDER OF PARTIES.

See CO-TENANCY, 4, 5.

JUDGMENTS.

1. JUDGMENT OR DECREE OF COURT OF COMPETENT JURISDICTION IS FINAL as a general rule, not only as to the subject-matter actually determined, but also as to every other matter which the parties might have litigated and have had decided in the cause. *Embury v. Conner*, 326.
2. FORMER JUDGMENT IS CONCLUSIVE when the parties and the question involved in the two suits are the same, notwithstanding the property claimed in them may be different. *Doty v. Brown*, 350.
3. JUDGMENT OF SUPREME COURT AS TO VALIDITY OF ASSESSMENT IS CONCLUSIVE in a subsequent action on the same assessment, where the cause was virtually between the same parties, although its title was different. *North R. M. Co. v. Shrewsbury Church*, 258.
4. FINAL JUDGMENT, UNTIL REVERSED, BARS SECOND SUIT, though given on insufficient premises and by a justice of the peace. *Kass v. Best*, 572.
5. INTENTION TO GIVE FINAL JUDGMENT being evident, the judgment will be final. The magistrate will not be held to strict form. *Id.*
6. PAROL EVIDENCE IS COMPETENT TO SHOW WHAT QUESTIONS WERE ACTUALLY CONTROVERTED and decided in a justice's judgment, for the purpose of determining what questions are concluded by it when it is offered as a bar to a second action. *Doty v. Brown*, 350.
7. JUDGMENT CREDITOR MAY CALL BY SCIRE FACIAS ON TERRE-TENANT OF LAND purchased by him from the debtor, while it was bound by the judgment, to show why the debt ought not to be levied on it; and such terre-tenant, not appearing and making defense, is estopped thereby. *Dengler v. Kiehn*, 441.
8. TERRE-TENANT IS PURCHASER OF ESTATE mediately or immediately from the debtor while it was bound by the judgment. *Id.*
9. SUBSEQUENT PURCHASER OR JUDGMENT CREDITOR IS NOT BOUND TO LOOK

- beyond the judgment docket, for, as regards them, it is the plaintiff's duty to see that his judgment is rightly entered. *Ridgway's Appeal*, 558.
10. OMITTING CHRISTIAN NAMES OF JUDGMENT DEFENDANTS IN DOCKETING JUDGMENT, though it will remain good between the parties, is fatal to the claim as regards subsequent purchasers or judgment creditors. *Id.*
 11. PARTIAL ASSIGNMENT OF JUDGMENT WITHOUT CONSENT OF JUDGMENT DEBTOR does not affect him. *Love v. Fairfield*, 148.
 12. ASSIGNEE OF MOIETY OF JUDGMENT, who does not mark notice of his interest therein upon the record, is postponed to a subsequent assignee. *Fisher v. Knox*, 503.
 13. JUDGMENTS ENTERED SOLELY FOR GIVING PREFERENCE to one creditor over another stand on the same ground as contracts of like character. *White v. Trotter*, 112.
 14. JUDGMENTS OF SISTER STATE MAY BE IMPROVED FOR FRAUD, and all proceedings under such judgment will be subject to the same rule when a claim to a specific property is made through such a medium. *Id.*
 15. JUDGMENT WILL NOT BE REVERSED FOR VARIANCE UNLESS ERROR IS VERY APPARENT. *Bolles v. Beach*, 263.
- See ACCOUNT; BANKRUPTCY AND INSOLVENCY, 2, 3; COSTS; EQUITY, 2; ESTOPPEL, 5; EXECUTIONS; FRAUDULENT CONVEYANCES, 6, 7; INFANCY, 2-7; JURY AND JURORS, 11; NEGOTIABLE INSTRUMENTS, 7, 27; PLEADING AND PRACTICE, 9, 20, 22; TROVER, 1, 2.

JUDICIAL NOTICE

See ATTACHMENTS, 2.

JUDICIAL SALES.

1. SALE UNDER ORDER OF ORPHANS' COURT IS JUDICIAL SALE. *Moore v. Shultz*, 446.
2. PURCHASER AT ORPHANS' COURT SALE TAKES ESTATE DISCHARGED from all debts due by decedent except liens, the amount of which cannot be rendered certain, and liens expressly created by act of assembly, which cannot, from their nature, be paid out of the purchase-money. *Id.*
3. EMPLOYMENT OF PUFFER AT SALE OF REAL ESTATE under an order of the orphans' court is a fraud on the purchaser, which, at his option, invalidates the sale. *Pennock's Appeal*, 561.

JURAT.

See WITNESSES, 1.

JURISDICTION.

See CORPORATIONS, 2, 8, 9-11; INFANCY, 2; JUDGMENTS, 1; JURY AND JURORS, 9; ORPHANS' COURT.

JURY AND JURORS.

1. PERSON IS NOT ABSOLUTELY DISQUALIFIED FROM ACTING AS JUROR who has formed or expressed an opinion respecting the guilt or innocence of the prisoner, when such opinion is based on mere rumor. *Nelms v. State*, 94.

2. **PERSON IS DISQUALIFIED FROM SERVING AS JUROR** when he has formed or expressed an opinion from what he has heard some one say respecting statements which had been made by some of the witnesses, notwithstanding the fact that the juror stated his opinion would not influence his verdict, but that he would be governed by the evidence. *Id.*
 3. **COMMON LAW FORBIDDING SEPARATION OF JURY IN CAPITAL CASE** before they have been discharged is of substantial purport, and a disobedience thereof will invalidate the verdict. *Peiffer v. Commonwealth*, 605.
 4. **SEPARATION OF JURY ON INDICTMENT FOR MURDER**, after they have been impaneled and sworn, although with defendant's consent, invalidates their verdict, and the prisoner will be held to answer another indictment. *Id.*
 5. **CONVERSATIONS BETWEEN OFFICERS IN HEARING OF JURY**, in which one of the officers stated that "it was a worse case than Dyson's," and the other stated that "public opinion was against the accused," constitute good cause for setting the verdict aside. *Nelms v. State*, 94.
 6. **COMMUNICATIONS BETWEEN OFFICER AND JUROR**, touching the subject of their deliberations, will be good cause for setting the verdict aside. *Id.*
 7. **JUROR SHALL NOT BE ALLOWED TO IMPEACH VERDICT** by disclosing his own misconduct, but he is competent to testify to the improper attempts made by a party to the suit, or one who may be the instrument of the party, to influence the jury. *Id.*
 8. **COURT MAY MOLD VERDICT** so as to meet the facts of the case and the ascertained conclusions of the jury. *McMahan v. McMahan*, 481.
 9. **DEFECT IN DECLARATION AMENDABLE BY LEAVE OF COURT** is cured by the verdict. And a neglect to allege, in the declaration in an action against a constable for not executing an execution, that the alderman had jurisdiction of the case in which the execution issued, is a defect in form merely, which might have been so amended. *Corson v. Hunt*, 568.
 10. **FORM OF VERDICT GIVEN FOR DEBT AND INTEREST** should not be for the whole amount as a debt, but the verdict should be given for the debt, and the residue of the amount, being the interest recovered, should be in the shape of damages for the detention of the debt. *North R. M. Co. v. Shrewsbury Church*, 258.
 11. **VERDICT RENDERED WHEN ISSUE OF FACT IS JOINED ON ONE COUNT**, but before judgment is reached on demurrers to other counts, will be considered as rendered on the first count only. *Goodman v. Gay*, 589.
- See AGENCY**, 1; **CRIMINAL LAW**, 14, 21; **FRAUDULENT CONVEYANCES**, 2-4; **HIGHWAYS**, 8, 10; **NEGOTIABLE INSTRUMENTS**, 10; **NEW TRIAL**; **PLEADING AND PRACTICE**, 9-13, 16, 19, 22; **STATUTE OF LIMITATIONS**, 6, 7; **TRESPASS**, 6; **WILLS**, 5, 6.

JUSTICES OF THE PEACE.

See JUDGMENTS, 4, 6.

JUSTIFICATION.

See PROCESS.

LANDLORD AND TENANT.

1. **NO ESTATE IN LAND CAN BE CONVEYED WITHOUT WRITING** except an estate at will. *Whitney v. Sweet*, 228.

2. PROOF OF TENANCY BY YEARLY RECEIPTS FOR RENT shows but a lease at will. *Id.*
3. TENANT HAVING NOTICE TO QUIT BECOMES TRESPASSER IF HE REMAINS on the premises. *Id.*
4. LESSOR MAY PEACEFULLY REMOVE TRESPASSING TENANT'S GOODS to a convenient distance, doing them no unnecessary damage. *Id.*
5. AGREEMENT TO PAY RENT IN ADVANCE IS VALID, and will support a distress, or an action if the rent is not paid on the agreed day. *Giles v. Comstock*, 374.
6. ACTION FOR RENT DUE IS NOT DEFEATED by proof that after the agreed day for payment the premises were sold on foreclosure of mortgage, divesting the landlord's title, and that the tenant attorned and paid rent to the purchaser. *Id.*
7. AGREEMENT TO GIVE LESSEE OF LAND OPTION OF PURCHASING It may be enforced by him, although the election to purchase rests solely with him, and this optional right may be transmitted by him to his vendee. The lessee has an equitable estate in the land under his contract for an optional purchase, which passes to his alienee, vesting him with the right to call for a specific execution on declaring his election. And this right may be enforced against a second purchaser with notice, from the original vendor. *Kerr v. Day*, 526.

See ESTOPPEL, 4; TRESPASS, 5, 6.

LARCENY.

See MAIL CONTRACTS, 2.

LATENT AMBIGUITIES.

See EVIDENCE, 21.

LEGACIES.

See EXECUTORS AND ADMINISTRATORS, 4; WILLS, 2, 23-25.

LEGISLATURE.

See CONSTITUTIONAL LAW.

LEGITIMACY.

See PARENT AND CHILD, 2.

LETTER OF CREDIT.

See GUARANTY, 3.

LEVY.

See EXECUTIONS, 1, 3, 4-9; INSURANCE—FIRE, 5; JUDGMENTS, 7.

LEX LOCI CONTRACTUS.

See MARRIAGE AND DIVORCE, 4, 5.

LIENS.

See ESTOPPEL, 5; EXECUTIONS, 11, 13, 19; FRAUDULENT CONVEYANCES, 6; JUDICIAL SALES, 2; MORTGAGES, 2; SALES, 8; SHIPPING, 2.

LIFE ESTATES.

See HUSBAND AND WIFE, 1.

LIMITATIONS.

See STATUTE OF LIMITATIONS.

LOST NOTES.

See NEGOTIABLE INSTRUMENTS, 7.

LUNACY.

See INSANITY.

MAIL CONTRACTS.

1. **MAIL CONTRACTORS ARE NOT LIABLE IN ASSUMPSIT FOR MONEY inclosed in a letter, handed to and lost by the mail-carrier employed by them, and through his neglect. *Hutchins v. Brackett*, 248.**
2. **POSTMASTER IS LIABLE FOR HIS SERVANT'S NEGLIGENCE, CARELESSNESS, AND DEFAULT, as well as his own, and a civil action will lie for a larceny of a letter containing money which was stolen from his office. *Coleman v. Frasier*, 727.**
3. **ASSISTANT POSTMASTER IS MERELY SERVANT, OR AGENT OF POSTMASTER, and the doctrine of the common law, that the principal who holds out an agent or servant in any public employment is liable in case for his negligence, will apply. *Id.***

MARRIAGE AND DIVORCE.

1. **MARRIAGE ABROGATES ALL DEBTS BETWEEN PARTIES TO IT. *Burleigh v. Coffin*, 236.**
2. **WANT OF CONSENT OF CAPABLE PERSONS WILL INVALIDATE MARRIAGE, like all civil contracts. *True v. Ranney*, 164.**
3. **MARRIAGE WILL BE INVALID IF ONE OF PARTIES IS SO IMBECILE as not to understand the nature and obligation of the contract. *Id.***
4. **LEX LOCI CONTRACTUS DETERMINES VALIDITY OF MARRIAGE CONTRACTS in general; but this rule holds only when not opposed to the religion, morality, or municipal institutions of the country in which it is sought to be applied. *Id.***
5. **LEX LOCI CONTRACTUS WILL NOT PREVAIL, if recognizing as valid a marriage entered into by an imbecile. *Id.***
6. **MARRIAGE IS VALUABLE CONSIDERATION, and sufficient to support a contract, whether executed or executory. *Gurtin v. Cromartie*, 406.**
7. **PROMISE TO PAY ONE CERTAIN SUM IF HE MARRY AND HAVE ISSUE is valid, and can be enforced against the promisor after the marriage of the promisee and issue had. *Id.***
8. **ID.—PROMISE TO MARRY IS UNNECESSARY where one agrees to pay another a certain sum if he marry and have issue, and such a contract is not void for want of mutuality, but the promisee may recover upon it upon the happening of the contingency. *Id.***
9. **NO TIME BEING SPECIFIED IN PROMISE TO PAY SUM ON MARRIAGE of the promisee with issue, the promisee has his life-time in which to perform, and upon performance completed, can claim the compensation agreed on,**

unless before any act done by him towards performance, the other party has retracted his offer. *Id.*

10. EVIDENCE OF GENERAL GOOD CHARACTER IS ADMISSIBLE IN ACTION FOR DIVORCE where the charge is adultery. *O'Bryan v. O'Bryan*, 128.
11. ACTION FOR DIVORCE IS IN NATURE OF CRIMINAL PROCEEDING. *Id.*
12. WHERE MARRIAGE CONTRACT IS ENTERED INTO FOR PURPOSE OF QUIETING CHILDREN of the intending husband, with the promise on his part that when this design was answered it should be canceled, the husband's taking the contract from the trustee, and with his wife declaring at the time that it should be null and void, may be regarded as equivalent to a cancellation thereof, and the fact that it was not actually canceled until some years after is not material, where it appears to have been preserved for the purpose of avoiding unpleasant scenes in the family. *In re Gangwere's Estate*, 554.
13. ACTUAL DESTRUCTION OF MARRIAGE CONTRACT BY HUSBAND BINDS HIM, and if ratified by the wife, after his death, it is binding on her also. *Id.*
14. CONTRACT HAVING FOR ITS OBJECT DISSOLUTION OF MARRIAGE RELATION, is against public policy, and is illegal and void. *Sayles v. Sayles*, 208.
15. AGREEMENT TO WITHDRAW OPPOSITION TO DIVORCE PROCEEDINGS cannot form a valid consideration for a promissory note, and the note is void. *Id.*
16. WHETHER MARRIAGE CONTRACT EXECUTED ON SUNDAY IS LEGAL, not decided, the court on that question being equally divided. *In re Gangwere's Estate*, 554.

See DOWER; PARENT AND CHILD, 8; SEDUCTION, 2; WILLS, 25, 30; WITNESSES, 9, 10.

MARRIED WOMEN.

1. FEME COVERT ENTITLED TO SEPARATE ESTATE IN PERSONAL PROPERTY, unless there be some clause of restraint of her dominion, may convey it, and do all other acts in respect to it, in the same manner as if she were a *feme sole*. *Harris v. Harris*, 393.
 2. EXECUTED CONVEYANCE OF LEGAL ESTATE VESTS LEGAL TITLE IN MARRIED WOMAN, subject to the husband's power to divest it by disagreeing to the conveyance. *Hileman v. Bouslaugh*, 474.
- See HUSBAND AND WIFE; PARTITION, 1; SPECIFIC PERFORMANCE, 2; WILLS, 28.

MASTER AND SERVANT.

See BAILMENTS, 2; MAIL CONTRACTS.

MAXIMS.

1. WHEN ONE OF TWO INNOCENT PERSONS MUST SUFFER, he whose neglect has caused the loss must bear it. *Ridgway's Appeal*, 586.
2. MAXIM, QUI PRIOR EST IN TEMPORE PORTIOR EST IN JURE, will not protect one who has neglected requisite caution to protect from imposition those who come after him, for entirely consistent and equally potent is the maxim, that one must so enjoy his property as to do no injury to another which can be prevented. *Fisher v. Knox*, 503.
3. DOCTRINE OF PROPERTY, the extent and limits of an owner's right to use that which is his, and the meaning of the maxim, *Sic utere tuo*, etc., explained, with reference to the liability of a land-owner for acts done by

him on his own land which cause damage to an adjoining owner. *Radcliff v. Mayor etc. of Brooklyn*, 357.

MINORS.

See PARENT AND CHILD.

MISFEASANCE.

See STATUTE OF LIMITATIONS, 5.

MISJOINDER.

See CORPORATIONS, 31.

MISREPRESENTATIONS.

See INSURANCE—FIRE, 3, 4.

MISTAKE.

See ACKNOWLEDGMENTS, 2; CORPORATIONS, 6; DEEDS, 9; INCANUTE, 4; NEGOTIABLE INSTRUMENTS, 13.

MISUSER.

See CORPORATIONS, 34, 35.

MORAL OBLIGATIONS.

See CONSTITUTIONAL LAW, 6.

MORTGAGES.

1. IF GRANTEE FAILS TO PAY MORTGAGE HE HAS AGREED TO PAY as a part of the consideration for the deed, and the grantor discharge the mortgage by giving a new security, he is damnified to the whole extent of the failure by the grantee to discharge the mortgage. *Booles v. Beach*, 263.
2. MORTGAGE LIEN ON DECEDENT'S ESTATE IS DIVESTED by sale thereof for the payment of debts by order of the orphans' court. *Moore v. Shultz*, 446.

See EQUITY, 3; EXTOPPEL, 3; FRAUDULENT CONVEYANCES, 6; LANDLORD AND TENANT, 6.

MULTIFARIOUSNESS.

See CORPORATIONS, 31.

MUNICIPAL CORPORATIONS.

See CORPORATIONS, 38-41; HIGHWAYS.

MURDER.

See CRIMINAL LAW, 4-9; JURY AND JURORS, 3-7.

MUTUALITY.

See MARRIAGE AND DIVORCE, 8; VENDOR AND VENDEE, 4.

NAMES.

TWO NAMES WHICH IN ORIGINAL DERIVATION ARE SAME, and are taken promiscuously in common use, though they do differ in sound, are sub-

stantially the same, and the use of one instead of the other will not support a plea in abatement. *Willerson v. State*, 137.

See **NEGOTIABLE INSTRUMENTS**, 13.

NAVIGABLE WATERS.

See **WATERCOURSES**.

NEGLIGENCE.

1. **NEGLIGENCE IN ENJOYMENT OF PROPERTY**, or the exercise of a right, is cause of redress in equity and at law, unless there has been supineness on the other side. *Fisher v. Knox*, 503.
 2. **NEGLIGENCE CONTRIBUTING TO LOSS** is imputed by law to the owner of animals which escape from his inclosure and stray upon a railroad track, where they are run over; and evidence that his fences were good, or that the animals were quiet and orderly, will not enable him to recover from the company for the accidental or careless killing of them. *Munger v. Tonawanda R. R. Co.*, 384.
 3. **RIGHT OF COMMONWEALTH CANNOT BE LOST BY LACHES OF ITS AGENTS**. *Hachalen v. Commonwealth*, 502.
- See **AGENCY**, 2; **ANIMALS**; **BAILMENTS**, 3, 4; **CORPORATIONS**, 6, 16, 38; **EXECUTIONS**, 5-7; **HIGHWAYS**; **MAIL CONTRACTS**; **MAXIMS**, 2.

NEGOTIABLE INSTRUMENTS.

1. **PROMISSORY NOTE AT MATURITY PRESENTS CONTRACT PERFECT IN ALL ITS PARTS** when standing alone, and is competent to sustain an action at law unsupported by any other fact. *Eckel v. Murphey*, 607.
2. **NEGOTIABLE INSTRUMENT SPECIALLY INDORSED BY PAYEE OR MADE PAYABLE SPECIALLY** cannot be recovered on by any one except the special indorsee or payee, unless it appear either that it is reindorsed or re-assigned by the special indorsee or payee, or that he has received satisfaction. The mere possession of such instrument by the indorser who had indorsed it to another is not sufficient evidence of his right of action against his indorser, without reassignment or receipt from the last indorsee. *Mitchell v. Fuller*, 594.
3. **NEGOTIABLE INSTRUMENT WITH FIRST INDORSEMENT IN BLANK** is afterwards assignable by mere delivery, as against the payee, drawer, or acceptor, though it have subsequent indorsements in full, for the subsequent holder by delivery may strike out intervening indorsements and declare and recover as indorsee of the payee. *Id.*
4. **INDORSER MAY ACT AS AGENT, OR BE EMPLOYED TO PROSECUTE SUIT** for the collection of a note, and not waive his right to notice of its non-payment. *Wilson v. Huston*, 138.
5. **ASSIGNMENT OF PROMISSORY NOTE WITHOUT RECOURSE** does not put the transferee upon inquiry as to the equities between the original parties thereto. *Bisbing v. Graham*, 510.
6. **ONE WHO INDORSES NOTE WITHOUT RECOURSE IS COMPETENT WITNESS** for a subsequent holder in an action to enforce payment of the note. *Id.*
7. **WHERE NOTE IS LOST AFTER SUIT IS BROUGHT TO RECOVER ON IT**, judgment may be rendered without giving indemnity, but the court should restrain the plaintiff from taking out execution thereon until he has furnished indemnity. *Id.*

6. WHERE SEVERAL NAMES ARE INDORSED IN BLANK upon the back of a negotiable instrument, the holder cannot fill in the blank above each so as to make it a joint assignment of all. *Morrison v. Smith*, 145.
9. INDORSER OF PROMISSORY NOTE, WITH KNOWLEDGE OF FAILURE OF HOLDER TO MAKE DEMAND upon the maker or acceptor, who makes an unconditional promise to pay, or acts in such a way as to show an acknowledgment of his liability, thereby waives his right to notice of demand and refusal to pay. *Wilson v. Huston*, 138.
10. WHAT FACTS WILL AMOUNT TO WAIVER OF NOTICE of non-payment of note is a question of law for the court. *Id.*
11. BILL OF EXCHANGE IS ORDER IN WRITING directing one person to pay money to a third person. *Rice v. Ragland*, 737.
12. STATEMENT OF CONSIDERATION EXPLAINING why a bill of exchange was drawn will not invalidate it. *Id.*
13. ERRONEOUS OR IMPERFECT DESCRIPTION OF NAME OF PARTY to a note, bill, or bond may be cured by averment and often by intendment. *Id.*
14. BILL MUST BE ACCEPTED BY PERSON INTENDED AS DRAWEE thereof, or if he refuse to accept, then by a third person for honor, or where the bill states no drawee, then by a third person in that character; but when accepted in either way, the party accepting only is liable as acceptor. *Id.*
15. DEMAND MUST BE MADE OF ACCEPTOR, and if made on any other person, will be improper. *Id.*
16. INDORSER CANNOT FREE HIMSELF FROM LIABILITY to a remote indorsee without notice by an agreement to that effect with any other indorsee. *Id.*
17. SPECIAL AGREEMENT BETWEEN ORIGINAL PARTIES to a bill of exchange, if not indicated by the paper itself, cannot be set up against a purchaser without notice and for value. *Id.*
18. INDORSER OF NOTE NEGOTIATED AFTER DUE holds it subject to all the equities between the original parties, whether he have notice thereof or not. *Comstock v. Draper*, 78.
19. INDORSER'S PROMISE TO PAY NOTE, MADE WITH KNOWLEDGE OF FAILURE TO PRESENT, is a waiver of presentment. *Schmidt v. Radcliffe*, 678.
20. DISHONORED NEGOTIABLE NOTE REMAINS NEGOTIABLE, AND SUBSEQUENT INDORSEMENT HAS SAME EFFECT as an indorsement before due, except that a demand must be made in a reasonable time to charge the indorser. *Leavitt v. Putnam*, 322.
21. INDORSEMENT OF OVERDUE NEGOTIABLE NOTE OMITTING WORDS "OR ORDER" nevertheless makes it payable to the indorsee's order, and his indorsee may sue him thereon. *Id.*
22. PAYMENT OF PART OF BILL BY FIRST INDORSER discharges the second indorser to that extent. *Rawlings v. Poindexter*, 125.
23. PART PAYMENT OF BILL BY SECOND INDORSER will prevent him from suing for the whole amount. *Id.*
24. PART PAYMENT OF BILL BY SECOND INDORSER will entitle him to recover the amount which he paid. *Id.*
25. INDORSER CAN RECOVER ON COMMON COUNT OF INDORSER AGAINST MAKER in an action against one of the parties who made the note. *Rambo v. Metz*, 694.
26. FORGERY OF NAMES AHEAD OF INDORSER, or any other fraudulent act of the maker to whose order a note was made payable upon the indorser,

will not affect a *bona fide* holder without notice before the note became due. *Id.*

27. NOTE GIVEN IN SATISFACTION OF JUDGMENT RECOVERED UPON INVALID INSTRUMENT is subject to the same defenses which might have been made to the said original instrument. *Comstock v. Draper*, 78.
 28. UNLIQUIDATED DAMAGES INCURRED BY DEFENDANT, THROUGH PLAINTIFF'S SUBSEQUENT NON-COMPLIANCE with some or any of his covenants, may be introduced as an equitable defense to a note previously given to plaintiff by defendant, according to agreement, in part payment on the unfulfilled contract. *Eckel v. Murphey*, 607.
 29. PAROL EVIDENCE THAT BILL WAS DRAWN FOR SUM EXPRESSED IN MARGINAL FIGURES, and not for the sum expressed in the body of it, where they differ, is inadmissible. *Smith v. Smith*, 652.
- See ALTERATION OF INSTRUMENTS, 2; BANKRUPTCY AND INSOLVENCY, 4; MARRIAGE AND DIVORCE, 15; STATUTE OF FRAUDS, 1; SURETYSHIP, 5; TROVER, 2; VENDOR AND VENDEE, 1.

NEW PROMISE.

See BANKRUPTCY AND INSOLVENCY, 1; CONTRACTS, 2.

NEW TRIAL.

1. REQUISITES FOR GRANTING NEW TRIAL FOR NEWLY DISCOVERED EVIDENCE ARE: 1. The evidence must be new; such as had no existence at the former trial, or its existence was not then known. 2. It must be material to the issue; going to the merits of the case, and not to discredit or impeach a former witness. 3. Reasonable diligence must have been used, both to discover and procure the evidence. 4. The evidence must not be cumulative. *State v. Carr*, 179.
2. NEW TRIAL WILL NOT BE GRANTED FOR NEWLY DISCOVERED EVIDENCE where, after conviction of perjury, affidavit is made that a material witness for the prosecution, after his examination, expressed hostile feelings towards the prisoner; such evidence going only to discredit or impeach the witness. *Id.*
3. MOTION FOR NEW TRIAL IS REMEDY IN CASE OF WRONG VERDICT. *Walter v. Gerrant*, 491.

See CONSTITUTIONAL LAW, 9; PLEADING AND PRACTICE, 19.

NON-FEASANCE.

See STATUTE OF LIMITATIONS, 5.

NON-NEGOTIABLE NOTES.

See NEGOTIABLE INSTRUMENTS, 21.

NONSUIT.

See PLEADING AND PRACTICE, 6.

NON-USER.

See CORPORATIONS, 34-36.

NOTICE.

ACTUAL POSSESSION OF LAND BY OR UNDER ONE HOLDING CONTRACT FOR CONVEYANCE thereof to him, where such possession is consistent with

the contract, is sufficient to affect with notice a second purchaser from the original vendor. *Kerr v. Day*, 528.

See GUARANTY, 4; INSURANCE—FIRE, 1, 4; JUDGMENTS, 12; NEGOTIABLE INSTRUMENTS, 4, 6, 9, 10, 16, 18; SURETYSHIP, 5; TRUSTS AND TRUSTEES, 2.

NOTICE TO QUIT.

See LANDLORD AND TENANT, 2, 7.

NOVATION.

See BANKRUPTCY AND INSOLVENCY, 2.

OATH.

See WITNESSES, 1.

OFFICES AND OFFICERS.

1. WHERE OFFICER DEPARTS FROM HIS LINE OF DUTY POINTED OUT BY LAW, at the promptings of the plaintiff, his securities are discharged, and he becomes the plaintiff's agent. *Rollins v. State*, 151.

2. PUBLIC OFFICERS, OR BODIES WHOSE DUTIES ARE JUDICIAL, ARE NOT LIABLE civilly for misconduct in their performance; otherwise where they violate a ministerial duty, even though their chief functions are judicial. *Rochester White Lead Co. v. Rochester*, 316.

See BANKS AND BANKING, 1; CORPORATIONS, 2-6, 14-16, 27, 28, 32, 36; ELECTIONS, 1, 3; PROCESS.

OPINIONS OF WITNESSES.

See CRIMINAL LAW, 7, 8.

ORPHANS' COURT.

ORPHANS' COURT IS STRICTLY COURT OF EQUITY within the limits of its jurisdiction. *Lewis v. Lewis*, 443.

See JUDICIAL SALES; MORTGAGES, 2.

OUSTER.

See CO-TENANCY, 1.

PARENT AND CHILD.

1. STEP-FATHER WHO ADOPTS CHILD OF HIS WIFE by her former husband, and maintains it as a member of the family, is not liable for wages for services which the child may have rendered during such relation, except on an express promise to pay. *Williams v. Hutchinson*, 201.

2. PROMISE TO PAY FOR SERVICES RENDERED BETWEEN MEMBERS OF SAME FAMILY will not be presumed. *Id.*

3. PERSON STANDING IN LOCO PARENTIS IS ENTITLED TO RIGHTS and subject to the liabilities of an actual parent, though not legally compelled to assume that relation. *Id.*

4. ADVANCEMENT IS PURE AND IRREVOCABLE GIFT MADE BY PARENT TO CHILD in anticipation of such child's future share of the parent's estate, and not involving the idea of future liability to answer. *Yundt's Appeal*, 496.

5. DECLARATIONS OF DECEDENT'S DAUGHTER RESPECTING DEBTS due decedent from her husband cannot change such debts into advancements. *Id.*

6. DECLARATION OF PARENT OF INTENTION TO TREAT EXISTING DEBT due from child or husband thereof as an advancement will not produce this effect when not agreed to by the child, nor accompanied by an act obliterating the obligation as a debt. *Id.*
7. INTEREST IS NOT GENERALLY CHARGEABLE ON ADVANCEMENTS; but when by the method used in calculating an heir's share the auditors have obtained the same result as if interest had not been charged on advancements, their report will be sustained. *Id.*
8. IN ACTION BY FATHER FOR LOSS OF DAUGHTER'S SERVICES, defendant's marriage with her, after the birth of the child, is not a bar to the recovery of exemplary damages, but may be given in evidence in mitigation of damages, *Michar v. Kistler*, 551.
9. HUSBAND IS PRESUMED TO BE FATHER OF WIFE'S ISSUE, when he cohabits with her. *Gurvin v. Cromartie*, 406.
10. FATHER MAY WAIVE HIS RIGHT TO MINOR CHILD'S SERVICES for the benefit of the child, and permit him to act for himself; and this may be done either expressly or by implication. *Cloud v. Hamilton*, 778.
11. ACQUISITIONS OF MINOR ACTING FOR HIMSELF are his own, and not his father's, where the father has waived his rights to his son's services. *Id.*
See FRAUDULENT CONVEYANCES, 4; SEDUCTION.

PAROL CONTRACTS.

See CONTRACTS, 7; ESTOPPEL, 3; EVIDENCE, 18, 20; PARTITION, 1.

PAROL EVIDENCE.

See DEEDS, 9; EVIDENCE, 18-21; JUDGMENTS, 6; NEGOTIABLE INSTRUMENTS, 29; PARTNERSHIP, 8; WATERCOURSES, 2.

PARTIES.

See ASSIGNMENT OF CONTRACTS, 1; CORPORATIONS, 31; COSTS; CO-TENANCY, 1, 4, 5; DEEDS, 12; EXECUTIONS, 26; JUDGMENTS, 2, 3, 10; PLEADING AND PRACTICE, 5; PROCESS, 2; WITNESSES, 3-6.

PARTITION.

1. PAROL PARTITION, IF FAIR AND EQUAL, AND EXECUTED BY CORRESPONDING POSSESSION IS GOOD, though some of the tenants be under coverture, and others of them elect to hold their purparts, as before, by community of possession. *McMahan v. McMahan*, 481.
2. ABSENT CO-TENANT NOT ASSENTING TO PARTITION may repudiate it by demanding a new partition of the whole tract, or he may adopt it by ratifying the acts of one who has assumed to act for him in such partition. *Id.*
See CO-TENANCY, 1; SPECIFIC PERFORMANCE, 1.

PARTNERSHIP.

2. PARTNERS BY CONTRACT OF PARTNERSHIP ACQUIRE JOINT INTEREST IN EFFORTS of the partnership, and are constituted mutual agents for all purposes within the scope and objects of the partnership. *Kessler v. McCants*, 711.

2. AFTER DISSOLUTION INTER VIVOS, JOINT INTEREST OF PARTNERS CONTINUES in the partnership property, and the mutual agency continues, with some restrictions, until the affairs of the partnership are administered. *Id.*
3. PARTNERSHIP IS NOT COMPLETELY DISSOLVED UNTIL ITS AFFAIRS ARE CLOSED. *Id.*
4. POSSESSION OF ANY PART OF ASSETS BY EITHER PARTNER does not sever the joint property, nor vest a separate interest in him. *Id.*
5. PARTNERSHIP DISSOLVED BY DEATH OF ONE OF PARTNERS, or being otherwise dissolved, one of the partners afterwards dies, the legal title to all the choses in action which belonged to the partnership becomes vested in the survivor, and the settlement of the partnership devolves on him. *Id.*
6. REPRESENTATIVE OF DECEASED PARTNER HAS NO LEGAL INTEREST or title in the choses in action which may have been in the possession of the deceased partner at the time of his death, and is liable to an action by the surviving partner for the recovery of them. *Id.*
7. INTENTION OF PARTNERS TO BRING REAL ESTATE INTO PARTNERSHIP must be manifested by deed or writing placed on record. *Ridgway's Appeal*, 586.
8. IT IS NOT COMPETENT TO SHOW BY PAROL THAT REAL ESTATE conveyed to two persons as tenants in common was purchased and paid for by them as partners, and was partnership property. *Id.*
9. NEIGHBORHOOD REPORT IS NOT COMPETENT EVIDENCE TO PROVE PARTNERSHIP, without proving any act of the partners. *Inglebright v. Hammond*, 430.
10. EVIDENCE OF SEPARATE INTERESTS OF PARTIES IN BUSINESS.—Evidence of the manner of doing business is competent as tending to show that the interests of the parties in the business were separate and that no partnership existed. *Foye v. Leighton*, 231.

See EVIDENCE, 11; SHIPPING, 1.

PATENTS.

See PUBLIC LANDS, 2.

PAYMENT.

LAW REQUIRES MAN TO DEVOTE WHOLE OF HIS PROPERTY, with some trivial exceptions, to the payment of his debts. *Trimble v. Turner*, 90.
See DEEDS, 13; EXEMPTIONS, 31; MORTGAGES, 2; NEGOTIABLE INSTRUMENTS, 22-24, 28; STATUTE OF LIMITATIONS, 6, 7; VENDOR AND VENUE, 1.

PENALTIES.

See CONTRACTS, 13.

PERFORMANCE.

See ASSUMPT; CONTRACTS, 5, 6; MARRIAGE AND DIVORCE, 9; SALE, 9;
SPECIFIC PERFORMANCE, 1.

PERJURY.

See CRIMINAL LAW, 10-19; NEW TRIAL, 2.

PLEADING AND PRACTICE.

1. **SUBSEQUENT COUNTS INTELLIGIBLY REFERRING TO TIME CORRECTLY AVERRED IN FIRST COUNT** sufficiently show the causes of action alleged therein to have accrued before suit brought. *Goodman v. Gay*, 589.
2. **WORDS "SURVIVOR OF," ETC., ASSUMED BY PLAINTIFF** in his pleading, may be treated as a *descriptio personæ*, or rejected as surplusage. *Kinsler v. McCants*, 711.
3. **DEMURRER TO EVIDENCE ADMITS ALL FACTS** that the evidence conduces to prove, though but in the slightest degree, or that the jury might, with the least degree of propriety, have inferred from it, and no testimony can be considered which impugns the truth of such facts. *Davis v. Steiner*, 547.
4. **AFTER SUBMISSION OF HIS CASE ON FINAL HEARING** a party has no right to the privilege of being allowed to amend. *Hopkins v. Hopkins*, 663.
5. **DEFECT OF PARTIES MAY BE TAKEN ADVANTAGE OF IN ACTION OF ACCOUNT** by two tenants in common against their co-tenants, under the plea that the defendants are not the bailiffs of the plaintiffs in the manner alleged in the declaration. *McPherson v. McPherson*, 416.
6. **VARIANCE BETWEEN ALLEGATA AND PROBATA IN ACTION OF ACCOUNT** by tenants in common against their co-tenants is a ground of nonsuit. *Id.*
7. **VARIANCE BETWEEN ALLEGATION AND PROOF IN ACTION ON ASSESSMENT** does not exist where the proof shows that an assessment alleged to have been made by three directors was signed by but two directors. *North R. M. Co. v. Shrewsbury Church*, 258.
8. **OBJECTION FOR VARIANCE BETWEEN DECLARATION AND PROOF**, when not taken at the trial, will be considered as waived. *Chandler v. Walker*, 202.
9. **IF PROPER INSTRUCTION HAS BEEN GIVEN**, a decision of the lower court will not be reversed for refusing to give others, the opposite of the one given. *Hurst v. Robinson*, 134.
10. **IF CHARGE ASKED EMBRACES SEVERAL DIFFERENT PROPOSITIONS**, part of which is good and a part bad, the court may refuse the whole. *Inglebright v. Hammond*, 430.
11. **INSTRUCTION THAT CERTAIN EVIDENCE CONDUCTED TO PROVE CERTAIN FACTS**, from which the court might find for the plaintiff, amounts but to a comment upon the testimony, and is an encroachment upon the province of the triers of fact. *Wilson v. Huston*, 138.
12. **INSTRUCTIONS ON POINT ASSUMED BY COUNSEL** should not be given, without some evidence from which it might be fairly inferred. *Haines v. Stauffer*, 493.
13. **COURT OF COMMON PLEAS MAY MAKE RULES** regulating a request for instructions on points; and where requested instructions have not been furnished to opposite counsel, according to rule, it is not error to refuse them. *Id.*
14. **WRIT OF ERROR CORAM NOBIS MAY BE BROUGHT AT ANY TIME**. The statutory limitation relates solely to errors of law. *Powell v. Gott*, 153.
15. **WHERE WRIT OF ERROR BRINGS UP FORMAL BILL OF EXCEPTIONS**, a court of error is strictly to confine its attention to what is presented by the bill and its proper appendages. *Forsyth v. Matthews*, 522.
16. **BILL OF EXCEPTIONS MAY CONTAIN RECITAL OF EVIDENCE IN EXTENSO**, or it may consist of a condensed statement of such of the facts proved, or which the testimony tended to prove, as is necessary to the proper com-

prehension of the points ruled by the court, and the instructions given to the jury. *Id.*

17. DUTY OF APPELLATE COURT UPON WRIT OF ERROR is simply to review the ruling of the judge as subjected to their revision by the bills of exception taken in the progress of the trial. It will be assumed that the facts stated are true, and no inquiry will be attempted as to the weight of the evidence or as to the propriety of the verdict. *Bolles v. Beach*, 263.
 18. APPELLATE COURT WILL PRESUME THAT LEAVE WAS GIVEN TO FILE ADDITIONAL COUNTS unless the contrary appears from the record. *Goodman v. Gay*, 589.
 19. WHERE ISSUES OF FACTS HAVE BEEN MADE UP IN CHANCERY CASE, and tried by a jury under the eye of the chancellor, and a motion for a new trial has been by him overruled, the appellate court will regard the finding of the jury as in the nature of a verdict at common law, and will not disturb it. *O'Bryan v. O'Bryan*, 128.
 20. WHERE IT IS AGREED ON TRIAL THAT COURT SHALL DECIDE the law on the undisputed facts, if evidence offered by the defendant is erroneously excluded, the supreme court cannot determine whether such evidence, if it had been admitted, would have been disputed or not, or whether or not the whole case would, in that event, have been submitted to the jury. And whether the court adjudicated on the excluded evidence or not, the judgment must be reversed. *Hopkins v. Forsyth*, 513.
 21. DEPOSITIONS OBJECTED TO MUST BE EMBODIED IN BILL OF EXCEPTIONS, or must be made a part of the record, that the court may know what the testimony was, in order to determine whether there was error or not; otherwise, the objection will not be considered. *Fisher v. Butcher*, 436.
 22. JUDGMENT WILL NOT BE REVERSED FOR ERRONEOUS INSTRUCTIONS IF NOT PREJUDICIAL; therefore a judgment will not be reversed on behalf of the plaintiff for an erroneous qualification of an instruction in his favor if the instruction itself was erroneous. *McPherson v. McPherson*, 416.
- See ACCOUNT; AGENCY, 1; ANIMALS, 2, 3; ASSIGNMENT OF CONTRACTS; ASSUMPT; ATTACHMENTS, 4; BANKRUPTCY AND INSOLVENCY, 3; CONTEMPT; CONTRACTS, 5; COSTS; CO-TENANCY, 1; CRIMINAL LAW, 10; ELECTIONS, 2, 4; EQUITY, 1; EVIDENCE, 2; FRAUD, 3; HIGHWAYS, 1, 10; INTEREST, 2; JURY AND JURORS; NAMES; NEGOTIABLE INSTRUMENTS, 3, 13, 25; NEW TRIAL; PROCESS; QUO WARRANTO, 2; WILLS, 4-6; WITNESSES.

POSSESSION.

- See ADVERSE POSSESSION; EXECUTIONS, 18, 20, 27, 29, 36, 37; EXECUTORS AND ADMINISTRATORS, 3; FRAUDULENT CONVEYANCES, 2, 3; GIFTS; HUSBAND AND WIFE, 1; MAIL CONTRACTS; NEGOTIABLE INSTRUMENTS, 2; NOTICE; PARTITION, 1; PARTNERSHIP, 4, 6; REPLEVIN; SALES, 9; SPECIFIC PERFORMANCE, 1; TRESPASS; VENDOR AND VENDEE, 5.

POWERS.

See USES, 2.

PREFERENCE TO CREDITORS.

See FRAUDULENT CONVEYANCES, 9; JUDGMENTS, 13.

PREMISES.

See DEEDS, 3.

PRESENTMENT.

See **NEGOTIABLE INSTRUMENTS.**

PRESUMPTIONS.

See **ADVERSE POSSESSION**, 2; **ALTERATION OF INSTRUMENTS**, 1; **CORPORATIONS**, 13, 20; **DAMAGES**, 2; **DEEDS**, 10; **EVIDENCE**, 1, 11; **EXECUTORS AND ADMINISTRATORS**, 3; **PARENT AND CHILD**, 2, 9; **PLEADING AND PRACTICE**, 18; **PUBLIC LANDS**, 1; **REMAINDERS**; **SHIPPING**, 3; **STATUTE OF LIMITATIONS**, 6, 7; **WILLS**, 7, 10.

PRINCIPAL AND AGENT.

See **AGENCY.**

PRINCIPAL AND SURETY.

See **SURETYSHIP.**

PROBATE

See **WILLS**, 4, 7.

PROCESS.

1. **VOID PROCESS AFFORDS NO PROTECTION TO OFFICER** serving or attempting to serve it. *State v. Weed*, 188.
2. **PROCESS MAY BE VOID AS TO PARTIES ORIGINATING AND ISSUING SAME**, but voidable only as to the officer serving it. *Id.*
3. **OFFICER IS PROTECTED IN SERVICE OF PROCESS**, AND **PERSON RESISTING HIM IS LIABLE**, notwithstanding errors or irregularities in issuing the process, where it is regular and legal in its frame, and appears to have been issued by a magistrate having jurisdiction of the subject-matter and of the person of the respondent. *Id.*
4. **OFFICER IS NOT TO BE GOVERNED BY MOTIVES AND DEEDS OF COMPLAINANT**, in executing criminal process regular and legal upon its face, and he will be protected, although the complainant's objects are illegal, and so known to be by the officer. *Id.*
5. **OFFICER IS PROTECTED IN SERVICE OF PROCESS** regular and legal upon its face, although the foundation of the complaint on which the warrant issued was false and groundless. *Id.*
6. **OFFICER WHO COLLECTS MONEY UNDER INVALID PROCESS** must pay the same; and his securities are responsible for its misapplication. *Rollins v. State*, 151.

PROMISSORY NOTES.

See **BANKRUPTCY AND INSOLVENCY**, 4; **MARRIAGE AND DIVORCE**, 15; **NEGOTIABLE INSTRUMENTS**; **STATUTE OF FRAUDS**, 1; **TROVER**, 2; **VENDOR AND VENDER**, 1.

PUBLIC LANDS.

1. **DEED TO THOMAS JEFFERSON, PRESIDENT OF THE UNITED STATES**, and his successors in office, vests the title in him as trustee, and a future conveyance by the United States will raise a presumption of a conveyance from the president to the government. *McCullough v. Wall*, 715.
2. **PATENT FOR LAND WITHOUT WITNESSES, BUT SIGNED AND SEALED BY SECRETARY OF WAR**, is sufficient to convey lands from the United States to a state, if the state recognizes the conveyance as valid. *Id.*

QUESTIONS OF LAW AND FACT.

See AGENCY, 1; EVIDENCE, 1; FRAUDULENT CONVEYANCES, 2-4; NEGOTIABLE INSTRUMENTS, 10; PLEADING AND PRACTICE, 11; TREMPASS, 6.

QUO WARRANTO.

1. PURVIEW OF TWELFTH SECTION OF ACT OF APRIL 12, 1840, covers all questions arising on writs of *quo warranto* between rival claimants of elective offices, and being highly remedial, should be liberally construed. *Com. ex rel. O'aghorn v. Cullen*, 450.

2. QUO WARRANTO IS COMMON-LAW PROCEEDING, under which a new defensive averment, answering plaintiff's case, is admissible. *Id.*

See CORPORATIONS, 34.

RAILROADS.

See DAMAGES, 1; EMINENT DOMAIN, 7; NEGLIGENCE, 2; TREMPASS, 7.

RATIFICATION.

See AGENCY, 2, 3; INFANCY, 4; MARRIAGE AND DIVORCE, 13; PARTITION, 2.

RECITALS.

See DEEDS, 12.

RECORDS.

See ATTACHMENTS, 2; JUDGMENTS, 9, 10, 12; PARTNERSHIP, 7.

REDEMPTION.

See ESTOPPEL, 6; INSURANCE—FIRE, 5.

REMAINDERS.

WHERE LEGAL ESTATE IS VESTED IN TRUSTEE, and not in a tenant for life, by express words to preserve and not to destroy nor defeat the remainder, the law will not presume that before such estate was vested, the trustee joined with the tenant in a feoffment to defeat it. *Habersham v. Hopkins*, 672.

See EXECUTIONS, 12; WILLS, 16, 21.

REMEDIES.

See CONSTITUTIONAL LAW, 2, 7; CONTRACTS, 11, 16-18; CORPORATIONS, 7; EXECUTIONS, 24; NEW TRIAL, 2.

REMOVAL OF CAUSES.

See CONSTITUTIONAL LAW, 8.

RENT.

See ADVERSE POSSESSION, 2; LANDLORD AND TENANT, 2, 5, 6.

REPAIRS.

See WATER.

REPLEVIN.

1. REPLEVIN MAY BE MAINTAINED BY ONE HAVING RIGHT OF POSSESSION, whether he has ever had possession or not, and whether his property in the goods be absolute or qualified. *Harlan v. Harlan*, 612.
2. TITLE TO REALTY MAY BE TRIED INCIDENTALLY IN REPLEVIN or other transitory action. *Id.*
See EXECUTIONS, 29, 30; FIXTURES, 2, 3.

RES GESTÆ.

See AGENCY, 4; EVIDENCE, 12, 13.

RESULTING TRUSTS.

See TRUSTS AND TRUSTEES, 1.

RETURNS.

See ELECTIONS, 1, 2; EXECUTIONS, 10, 24.

REVERSAL.

See JUDGMENTS, 15; PLEADING AND PRACTICE, 9, 20, 22.

REVERSIONS.

See WASTE.

REVOCATION.

See WILLS, 14, 15.

RIPARIAN RIGHTS.

See WATERCOURSES, 4-7.

SALES.

1. WHERE BUYER OF CLOCK AGREES TO PAY FOR IT at the expiration of a year, on condition that it performs to his satisfaction, the contract to pay becomes absolute at the end of that time, unless, within a reasonable time, he offers to return it and gives notice of his dissatisfaction. If the residence of the seller is unknown, or if he resides in another state, the buyer must, in order to excuse his failure to give notice and to offer to return, show that he used due diligence to ascertain the seller's residence. *Dacey v. Erie Borough*, 533.
2. WHERE ONE CARRIES WHEAT TO MILL TO BE GROUND INTO FLOUR, the contract is not a sale, but the property in the flour is in the one depositing the wheat, although it is, with his knowledge, mingled with wheat belonging to the miller. *Inglebright v. Hammond*, 430.
3. VENDOR CONTRACTING TO DELIVER GOODS AT DEPOT OF COMMON CARRIER cannot excuse non-performance by proving that the vendee did not furnish a place at the depot for the deposit of the goods, as this is the vendor's duty. *Eckel v. Murphey*, 607.
4. TITLE TO PERSONAL PROPERTY DOES NOT PASS TO VENDEE by sale thereof without delivery until the goods sold are specifically identified by the parties to the sale. *Golder v. Ogden*, 618.
5. MERE INTENTION OF VENDOR TO DELIVER TO VENDEE CERTAIN SPECIFIC GOODS is not a sufficient identification thereof to pass the title. *Id.*

6. **WHAT IS SUFFICIENT DELIVERY OF GOODS.**—Where defendant bid off at auction a portion of a quantity of hay, it was held that to constitute a delivery of it, separation of the portion so bid off from the residue, and an offer and an acceptance by the buyer, were necessary. *Messer v. Woodman*, 241.
7. **DELIVERY IS INCOMPLETE WHILE ANYTHING REMAINS TO BE DONE.** *Id.*
8. **TO CONSTITUTE DELIVERY, IT MUST BE SUCH AS WAIVES THE VENDOR'S LIEN.** *Id.*
9. **IN DELIVERY OF GOODS ALREADY IN BUYER'S POSSESSION,** the same acts of segregation, offer, and acceptance are necessary as in other cases. *Id.*
10. **WARRANTY OF SOUNDNESS OF HORSE IS NOT BROKEN** by a curable and temporary injury existing at the date of the sale, not injuring him for immediate service. It seems, however, that the warranty is broken if the infirmity, although not permanent or incurable, renders the animal less fit for present use. *Roberts v. Jenkins*, 169.
11. **PROPERTY SOLD UPON ILLEGAL OR FRAUDULENT CONSIDERATION** has the effect to pass title to the vendee; but the parties have no remedy against each other. *Ohio L. I. & T. Co. v. M. I. & T. Co.*, 742.
12. **AT COMMON LAW, NO WARRANTY OF QUALITY WAS IMPLIED IN SALE** of goods; *caveat emptor* was the rule, and in the absence of fraud, if the article proved to be of bad quality, the purchaser had no redress, unless he had taken the precaution to require a warranty. This rule prevails in North Carolina. *Dickson v. Jordan*, 403.
13. **IMPLIED WARRANTY OF QUALITY IN SALE OF GOODS** is not raised by the fact that the seller knew the purpose for which the goods were intended, or that the goods were not present to be judged of by the defendants, if the bad quality could not have been detected by an examination, and it was necessary to put them in use before their unfitness could be discovered. *Id.*
14. **IMPLIED WARRANTY OF QUALITY DOES NOT ARISE WHERE PURCHASER ORDERS GOODS** from the seller, and has no opportunity of seeing them; in such a case the purchaser constitutes the vendor his agent, to select for him, and only has a right to a fair exercise of the vendor's judgment in place of his own, and he has no cause of complaint because of a defect in the goods unless there be fraud. *Id.*
15. **INDEBITATUS ASSUMPSIT FOR GOODS SOLD BUT NOT DELIVERED** will not lie. *Messer v. Woodman*, 241.

See ATTACHMENTS, 3; EVIDENCE, 10, 11, 18; EXECUTORS AND ADMINISTRATORS, 1, 2, 4; SURETYSHIP, 6; WITNESSES, 8.

SATISFACTION.

See EXECUTIONS, 2, 32, 33; NEGOTIABLE INSTRUMENTS, 27.

SCIRE FACIAS.

See ESTOPPEL, 5; JUDGMENTS, 7.

SEAWORTHINESS.

See SHIPPING, 2.

SEDUCTION.

1. **ACTION FOR SEDUCTION IS FOUNDED ON LOSS OF SERVICES,** real or supposed, and cannot be maintained in favor of a step-father for seduction of

his step-daughter after she has left his family and service, even though she returned and was maintained by him during her confinement. *Bartley v. Richtmyer*, 338.

2. ACQUITTAL OF DEFENDANT ON INDICTMENT FOR SEDUCTION, on the ground of his subsequent marriage with the person seduced, does not affect a civil action brought against him by her father to recover damages for loss of her services by reason of the seduction. *Richer v. Kistler*, 551.

See PARENT AND CHILD, 8.

SEPARATE ESTATE.

See MARRIED WOMEN.

SEQUESTRATION.

See WILLS, 27.

SHELLEY'S CASE.

See WILLS, 16-18, 21.

SHERIFFS.

See EXECUTIONS; WITNESSES, 11.

SHERIFF'S DEED.

See EXECUTIONS, 34, 35; FIXTURES, 1.

SHERIFF'S SALE.

See ESTOPPEL, 6; EVIDENCE, 13; EXECUTIONS, 3, 6-8, 12-16, 19, 24-29, 32, 33, 36, 37; STATUTE OF LIMITATIONS, 4.

SHIPPING.

1. JOINT OWNERS OF VESSEL ARE NOT REGARDED AS PARTNERS merely by reason of their joint ownership of her, or from the fact of their using her for a common purpose. *Hopkins v. Forsyth*, 513.
2. SHIP'S HUSBAND HAS NO SUCH LIEN FOR ADVANCES as a sheriff can satisfy out of the proceeds of a sale of her. *Id.*
3. PRESUMPTION THAT VESSEL WAS UNSEAWORTHY at the commencement of a voyage arises from her defective condition on arriving at port, unless adequate cause be shown to account for such defective condition. *Cameron v. Rich*, 670.

See EXECUTIONS, 25.

SLAVES.

See EXECUTIONS, 11.

SOVEREIGNTY.

See NEGLIGENCE, 3.

SPECIAL INDORSEMENTS.

See NEGOTIABLE INSTRUMENTS, 2, 5, 6.

SPECIFIC PERFORMANCE.

1. IT IS SUFFICIENT PART PERFORMANCE OF ORAL CONTRACT TOUCHING TITLE OF LANDS to found a claim for specific performance thereof and avoid

the bar of the statute of frauds, when one in prior possession of a portion of a tract of land remains in full possession of the whole tract under an oral agreement of partition awarding to him such full possession. *McMahon v. McMahon*, 481.

2. CONTRACT TO BE PERFORMED WHEN ANOTHER'S WIFE SIGNS DEED, and if she does not sign it the contract to be null and void, cannot be enforced if the wife dies without signing such deed. *Pendergast v. Meserve*, 234.
See CONTRACTS, 14; LANDLORD AND TENANT, 7.

STATUTE OF FRAUDS.

1. PROMISE TO SIGN NOTE AS SURETY FOR ANOTHER, without consideration, is merely collateral, and is within the statute of frauds, and void. *Taylor v. Drake*, 680.
2. PROMISE BY THIRD PERSON TO PAY DEBT OF ANOTHER must be in writing. *Id.*

See GIFTS; GUARANTY, 1, 3; LANDLORD AND TENANT, 1; SPECIFIC PERFORMANCE, 1.

STATUTE OF LIMITATIONS.

1. ACKNOWLEDGMENT TO TAKE CASE OUT OF STATUTE OF LIMITATIONS need not refer to the amount of the debt, but there must be no uncertainty in it as to the debt referred to. *Davis v. Steiner*, 547.
2. ACKNOWLEDGMENT TO TAKE CASE OUT OF STATUTE OF LIMITATIONS must contain an unqualified and direct admission of a previous debt, which the party is willing to pay. *Kensington Bank v. Patton*, 564.
3. PROMISE TO TAKE CASE OUT OF STATUTE OF LIMITATIONS must be a promise to pay on demand, an immediate, unqualified promise to pay, without restriction or conditions. *Per Rogers, J. Id.*
4. STATUTE OF LIMITATIONS IN CASE OF FRAUD.—Where complainant claimed that at a sheriff's sale defendant stifled competition by declarations to bidders, but that he (complainant) did not learn of it for six years, though he was at the sale: *Held*, that his ignorance was his own fault, and the defendant might avail himself of the statute. *Thrower v. Chweton*, 660.
5. STATUTE OF LIMITATIONS, IN CASE OF MISFEASANCE OR NON-FEASANCE OF AGENT, begins to run at the termination of the agency, if it is general or continuing; but if it is special, and the agent receives special authority for each act, then the statute begins to run from each of the several transactions. *Hopkins v. Hopkins*, 663.
6. PRESUMPTION OF PAYMENT ARISING FROM LAPSE OF TIME, in cases to which the statute of limitations does not apply, may create the belief of payment, but is of itself insufficient to justify a verdict solely on that ground. *Smithpeter v. Ison*, 732.
7. PRESUMPTION OF PAYMENT RAISED FROM DEFINITE TIME no more permits a jury to give to a shorter time a force beyond its natural efficacy in producing belief than the bar under the statute of limitations permits a near approach to the statutory period to avail; and a verdict found in contravention of the principle herein stated will be set aside. *Id.*

See ADVERSE POSSESSION, 1; ATTORNEY AND CLIENT, 1, 2; EXECUTORS AND ADMINISTRATORS, 1.

STATUTES.

ATTEMPT TO CONTRAVENTE PUBLIC STATUTE is illegal, whether it is expressly prohibited by such statute or not. *Rice v. Maxwell*, 85.

See ATTACHMENTS, 5; BANKS AND BANKING, 2; CONTRACTS, 10, 12, 13; CONSTITUTIONAL LAW; CORPORATIONS, 22; CRIMINAL LAW, 12; DAMAGES, 7; EMINENT DOMAIN, 2, 3; HIGHWAYS, 1, 5; INTEREST, 1; QUO WARRANTO, 1.

STAY OF EXECUTION.

See EXECUTIONS, 6, 7.

STEP-FATHERS.

See PARENT AND CHILD, 1; SEDUCTION, 1.

STOCK AND STOCKHOLDERS.

See CORPORATIONS, 4, 5, 7, 8, 10, 11, 15, 19, 28-31; EXECUTIONS, 4.

STREETS.

See ANIMALS, 3; CORPORATIONS, 40; HIGHWAY.

SUCCESSION.

See PARENT AND CHILD,

SUNDAYS.

See MARRIAGE AND DIVORCE, 16.

SURETYSHIP.

1. SURETIES OF ADMINISTRATOR ARE ALL LIABLE TO DISTRIBUTORS of an estate, whatever their rights may be *inter se*. *Glenn v. Wallace*, 657.
2. SURETIES ON SUBSTITUTED ADMINISTRATION BOND are primarily liable. *Id.*
3. IF ONE OF SEVERAL SURETIES PAYS DEBT, he is entitled to demand contribution from his co-surety for whatever he has paid more than his aliquot part. *Aiken v. Peay*, 684.
4. WHERE ONE OF SEVERAL SURETIES PAYS DEBT, and his co-surety dies before judgment, he may sue the executors of the deceased for contribution. *Id.*
5. SURETY FOR ACCEPTANCE AND PAYMENT OF BILL CAN COMPLAIN OF WANT OF NOTICE of its dishonor, only in case and to the extent that he has suffered loss through such want of notice. *Union Bank v. Oester*, 280.
6. GOODS FURNISHED VENDOR ARE NOT CONSIDERATION between the vendor and a party promising to become surety to the vendee. *Taylor v. Drake*, 680.

See OFFICERS AND OFFICERS, 1; PROCEEDS, 6; STATUTE OF FRAUDS, 1.

SURVEY.

See EVIDENCE, 4.

SURVIVORSHIP.

See PARTNERSHIP, 5, 6.

TENANCY AT WILL.

See LANDLORD AND TENANT, 1, 2.

TENANCY IN COMMON.

See CO-TENANCY.

TENANTS.

See LANDLORD AND TENANT.

TENDER.

See EQUITY, 3.

TIME.

See PLEADING AND PRACTICE, 1.

TRESPASS.

1. TO MAINTAIN TRESPASS QUARE CLAUSUM FREGIT AGAINST MERE WRONGDOER, it is unnecessary that the land shall be enclosed, where possession is known, marked, and uninterrupted. *Chandler v. Walker*, 202.
2. GIST OF ACTION OF TRESPASS QUARE CLAUSUM FREGIT is the disturbance of the possession. *Id.*
3. TRESPASS QUARE CLAUSUM FREGIT MAY BE MAINTAINED AGAINST WRONGDOER by one in actual possession without, or constructive possession with, title. *Id.*
4. POSSESSION IS SUFFICIENT TO MAINTAIN TRESPASS AGAINST MERE WRONGDOER for cutting timber from the unfenced portion of a lot, when occupied for several years up to a spotted line, as a part of a farm, and as a wood and timber lot attached thereto, other portions of the lot being cleared, cultivated, and fenced. *Id.*
5. ABUSE OF AUTHORITY IN REMOVING TRESPASSER'S goods renders one a trespasser himself *ab initio*. *Whitney v. Swett*, 228.
6. WHETHER GOODS WERE REMOVED IN IMPROPER MANNER is a question for the jury. *Id.*
7. RAILROAD COMPANY IS TO BE DEEMED OWNER, for the time being, of lands which it has lawfully acquired for a road-bed, in such sense that animals which stray upon the track are trespassers. *Munger v. Tonawanda R. R. Co.*, 384.

See ACCESSION, 2; LANDLORD AND TENANT, 3, 4; NEGLIGENCE, 2; WITNESSES, 11.

TROVER.

1. TROVER WILL NOT LIE FOR CONVERSION OF JUDGMENT. *Platt v. Potts*, 412.
2. TROVER WILL NOT LIE FOR NOTE AFTER JUDGMENT RENDERED ON IT, as the note then has no existence. *Id.*

See FIXTURES, 2, 3.

TRUSTS AND TRUSTEES.

1. ONE BUYING LAND WITH MONEY OF ANOTHER, and taking legal title in his own name, becomes trustee of a resulting trust in favor of the latter, even though he stood in no fiduciary character to the person whose money has been used. *Beck v. Ulrich*, 507.
2. PURCHASER FROM TRUSTEE WHO SELLS IN HIS OWN RIGHT need not pay purchase-money, though he has accepted a deed and given his bonds; as to unpaid purchase-money, he is a volunteer. *Id.*

3. INNOCENT PURCHASER OF TRUST ESTATE WITHOUT NOTICE OF TRUST is protected as far as he has paid his money. *Id.*
 See ATTORNEY AND CLIENT, 2; CORPORATIONS, 2, 3, 5, 8, 23, 31; PUBLIC LANDS, 1; REMAINDERS; WILLS, 24, 25.

USAGES.

1. EVIDENCE OF OPPOSITE USAGE OR CUSTOM is not admissible to rebut a particular fact attempted to be proved by the opposite party. *Foye v. Leighton*, 231.
2. EVIDENCE THAT IN SIMILAR BRICK-YARDS the business is jointly carried on is not competent to prove that it is so in any particular one. *Id.*
3. PROPER OFFICE OF EVIDENCE OF CUSTOM OR USAGE is to assist in ascertaining the intent of the parties. *Id.*
4. EVIDENCE OF CUSTOM MAY PROPERLY BE GIVEN TO EXPLAIN and give the proper effect to the contracts and acts of parties; but it is not admissible to change the title to property, contrary to an established rule of law. *Inglebright v. Hammond*, 430.

USES.

1. USE IS EXERCISED WHERE THERE IS IN EACH PERSON SHARED to the use, a *cestui que use*, a well-defined use, and a seisin out of which it is to issue, and the property vests in the *cestui que use*, from the date of the deed creating the use. *Moore v. Shultz*, 446.
2. POWER TO DISPOSE OF ESTATE BY WILL GIVEN TO *CESTUI QUE USE*, in the deed creating the use, effects nothing, as the deed vests in him the fee. *Id.*

VARIANCE.

See JUDGMENTS, 15; PLEADING AND PRACTICE, 6-8.

VENDOR AND VENDEE.

1. WHERE VENDOR RECEIVED BOND FOR TITLE, to be made when the purchase-money was paid, and that was payable in installments, the right to enforce payment is not distinct and independent from the ability to make title, and the defendant may set up and show in bar of the action on the notes a want of title in the vendor. *Feemster v. May*, 83.
2. WHERE ONE OF TWO JOINT OWNERS OF LAND, WHO ARE BOUND BY CONTRACT TO CONVEY IT, transfers his interest to his co-owner, the latter will then be bound to convey to the party entitled to demand such conveyance, even though such party be his former co-owner, who joined with him in the contract. *Kerr v. Day*, 526.
3. STIPULATION IN CONTRACT OF SALE OF LAND TO REPAY PURCHASE-MONEY at a specified time, if the vendee desires it, is not void for want of consideration, for the purchase and payment of the price furnish a sufficient consideration. *Ebo v. Woodworth*, 370.
4. SUCH STIPULATION IS NOT VOID FOR WANT OF MUTUALITY, even though it does in terms require that the vendee, on demanding repayment of the price, will return the property; a condition to that effect will be implied; or a return may be enforced in equity. *Id.*
5. VENDOR WHO IS PUT INTO POSSESSION cannot afterwards acquire a title and set it up in opposition to the vendor. *Champlin v. Dotson*, 102.

8. **VENDOR WHO BUYS IN OUTSTANDING INCUMBRANCES**, or procures another party to do so for the benefit of the vendee, will not be permitted to set up an adverse title under them against the vendor. *Id.*
 7. **VENDOR WHO PURCHASES OUTSTANDING INCUMBRANCES** will only be entitled to be credited for the amount which he expended in purchasing the incumbrances. If he should claim more than this, a court of equity will interpose to prevent a recovery. *Id.*
- See AUCTIONS; LANDLORD AND TENANT, 7; MORTGAGES, 1; NOTICE; TRUSTS AND TRUSTEES.

VENUE.

See HIGHWAYS, 1.

VERDICT.

See ANIMALS, 2; HIGHWAYS, 8, 10; JURY AND JURORS, 8-11; NEW TRIAL, 3; PLEADING AND PRACTICE, 19; STATUTE OF LIMITATIONS, 6, 7.

VOLUNTEERS.

See TRUSTS AND TRUSTEES, 2.

WAIVER.

See CONTRACTS, 5; INSURANCE—FIRE, 1; NEGOTIABLE INSTRUMENTS, 4, 9, 10, 19; PARENT AND CHILD, 10, 11; PLEADING AND PRACTICE, 8.

WARRANTS.

See PROCESS, 5.

WARRANTY.

See ESTOPPEL, 2; EVIDENCE, 18, 21; SALES, 10, 12-14.

WASTE.

1. **ACTION OF WASTE BY REVERSIONER AGAINST LIFE TENANT** is provided for by statute in Rhode Island, and the liability of the life tenant therein, though very stringent, is to be fairly and reasonably enforced. *Olemon v. Steere*, 621.
2. **CONVERTING MEADOW INTO PASTURE BY LIFE TENANT IS WASTE** in England, but not so in Rhode Island, unless detrimental to the inheritance and contrary to the ordinary course of good husbandry. *Id.*
3. **PERMITTING PASTURE TO BECOME OVERGROWN WITH BRUSH IS WASTE** on the part of a tenant for life, in England, but not so in Rhode Island, unless there be such neglect in cutting the brush as a man of ordinary prudence would not permit. *Id.*
4. **LIFE TENANT CUTTING AND SELLING WOOD IS GUILTY OF WASTE**, he having a right to cut wood only for fuel and repairs, but if the reversioner assents to the cutting and sale, he cannot claim a forfeiture on their account, and if the estate is by will charged with the comfortable support of the tenant, and the wood cut and sold went for the tenant's support, that fact is to be considered in determining the question of assent. *Id.*
5. **CUTTING HOOP-POLES IS WASTE** by a life tenant, unless that is the ordinary mode of managing the farm, but not otherwise. *Id.*

6. **LIFE TENANT IS NOT BOUND TO REPAIR HOUSE** which is out of repair when received, if not reparable, or if the expense of repairing it would exceed its value; otherwise, if repairs would make it tenantable. *Id.*
7. **DESTRUCTION BY LIFE TENANT OF HOUSE NOT TENANTABLE IS WASTE**, unless it be with the reversioner's consent; and the life tenant is liable, even if the house be torn down without his permission after his leaving the premises. *Id.*
8. **REMOVAL OF CRIB ERECTED BY LIFE TENANT NOT ANNEXED TO FREEHOLD** is not waste. *Id.*
9. **TEARING DOWN OLD AND UNSTABLE BARN WHICH IS IN DANGER OF FALLING** and injuring the life tenant's cattle is not waste, unless its condition was due to the tenant's neglect to repair. *Id.*
10. **TEARING BOARDS FROM BUILDINGS AND DESTROYING FENCES** is waste. *Id.*
11. **WASTE FORFEITS PART OF PREMISES WASTED**, but by a destruction of the dwelling-house the whole premises are forfeited. *Id.*
12. **DAMAGES MUST BE ASSESSED IN ACTION OF WASTE** for the place wasted over and above the value of the place. *Id.*

WATERCOURSES.

1. **LAND BOUNDED BY NAVIGABLE RIVER** extends to the middle of the stream, unless the conveyance denotes an intention to stop short of that. *McCullough v. Wall*, 715.
2. **PAROL DECLARATION OF INTENTION CANNOT VARY DESCRIPTION IN DEED** so as to extend the land to low-water mark instead of to the middle of the stream. *Id.*
3. **ISLAND LYING ON ONE SIDE OF STREAM** belongs to the owner of the bank on that side. *Id.*
4. **ISLAND LYING IN MIDDLE OF RIVER**, so that the original middle line passes through it, belongs to the owners of the land on the two banks, according to the original dividing line. *Id.*
5. **THREAD OF STREAM IS ASCERTAINED BY MEASUREMENT** across, without regard to the depth of the water. *Id.*
6. **RIPARIAN PROPRIETOR'S OWNERSHIP OF LAND UNDER WATER** of an un-navigable stream is measured by lines at right angles to the bank, without regard to the course of the lines bounding the remainder of his tract. *Id.*
7. **LAND COVERED BY WATERS OF RIVER, ABOVE FALLS OBSTRUCTING NAVIGATION**, is subject to public easements; as the right to improve the river, the right of fishing, and the right to its use as a public highway. *Id.*
8. **NAVIGABLE RIVER IS ONE IN WHICH TIDE RISES AND FLOWS**. *Id.*

WILLS.

1. **WHEN WILL CONSISTS OF SEVERAL DETACHED SHEETS**, it is not necessary that each sheet should be separately attested by witnesses as well as signed by the testator. *Martin v. Hamlin's Ex'rs*, 673.
2. **WRITTEN SHEET NOT HAVING BEEN SIGNED BY TESTATOR**, but connected by the sense and the dependence of it upon another sheet which has been properly signed and attested, will be considered as being a part of the will. *Id.*

3. INSTRUMENT PASSING PROPERTY IN DONOR'S LIFE-TIME, although of alleged testamentary character, being not absolutely a will, must be a deed, for there is no middle ground. *Hileman v. Boulaugh*, 474.
4. REGISTER OF WILLS IS EMPOWERED BUT NOT REQUIRED TO DIRECT ISSUE OF FACT to the common pleas in every case where caveat is entered against the admission of a testamentary writing to probate. *Wilhoft's Appeal*, 597.
5. ISSUE OF FACT SHOULD NOT BE AWARDED TO JURY by register of wills, when testimony of witnesses to establish the will is not impeached and there is no real conflict in the evidence. *Id.*
6. DUTY OF REGISTER OF WILL AFTER EVIDENCE HAS BEEN HEARD is, in the exercise of a legal discretion, to decide upon it, or refer the decision to a jury; and the propriety of his determination may be examined on appeal. *Id.*
7. IT IS PRESUMED THAT ALL SHEETS OF WILL written on separate sheets of paper are produced for probate, in the absence of evidence to the contrary. *Id.*
8. WILL MAY BE MADE ON DISTINCT PAPERS, if they are connected by their internal sense, or by a coherence or adaptation of parts. *Id.*
9. CANCELLATION OF BEQUEST, STANDING SEPARATELY FROM OTHER BEQUESTS, does not cancel the other bequests. *Id.*
10. INTERLINEATIONS IN TESTATOR'S HANDWRITING are presumed to have been made at or before the execution of the will. *Id.*
11. REPUBLICATION OF WILL BY CODICIL IS GOOD, though the will be not present at the time. *Id.*
12. MEMORANDUM UNDER TESTATOR'S SIGNATURE DOES NOT INVALIDATE WILL on ground that the statute prescribes the signature to be at the end of the will, when the will is afterwards republished by codicil. *Id.*
13. UNSIGNED ADDITION TO WILL DOES NOT INVALIDATE WILL on ground that the statute prescribes the testator's signature to be at the end of the will, if it bears neither upon the contents of the will nor on its interpretation. *Id.*
14. TO EFFECT REVOCATION OF WILL, INTENTION TO REVOKE must appear clearly and unequivocally. *Id.*
15. OMISSION TO MENTION CODICIL IN ACT OF REPUBLICATION, in which other codicils made prior to that act are mentioned, implies a revocation thereof; but this may be rebutted by circumstances showing a contrary intention. *Id.*
16. RULE IN SHELLEY'S CASE IS LAW IN THIS STATE, which, by turning a limitation for life, with remainder to heirs of the body, into an estate-tail, is the handmaid of the statute for barring entails; and where the limitation is to heirs generally, it cuts off what would otherwise be a contingent remainder, destructible only by a common recovery. *Hileman v. Boulaugh*, 474.
17. WORDS OF LIMITATION IN WILL, USED IN IMPROPER SENSE, may be explained by the context so as to exclude the devise from the rule in *Shelley's Case*, which operates upon the intention when ascertained; but where the intention has been ascertained by the application of the ordinary rules of construction, and is found to be within the rule, the rule applies without exception. *Id.*

18. IN WILL, LEGAL FORCE OF WORD "HEIRS" MAY BE CONTROLLED BY CONTEXT evincing such a demonstrative intention to misapply it as cannot be mistaken; in an executed conveyance, never. *Id.*
19. OMISSION OF LIMITATION OVER IN DEFAULT OF ISSUE, which was made in *Shelley's Case*, is immaterial as affecting the application of the rule in *Shelley's Case*. *Id.*
20. SUPERADDED WORDS OF LIMITATION WHICH IMPORT SAME COURSE OF DESCENT are inoperative even in a will. *Id.*
21. RULE IN SHELLEY'S CASE GIVES ANCESTOR ESTATE FOR LIFE, in the first instance, and by force of the devise to his heirs, general or special, the inheritance also, by conferring the remainder on him, as the stock from which alone they can inherit. *Id.*
22. EXPRESS LIMITATION TO HEIRS OF BODY fills up the measure of the intention, and leaves nothing to be supplied by intendments from added limitations. *Id.*
23. BEQUEST TO "ALL THE CHILDREN" OF PERSON NAMED, EQUALLY, "when they shall severally attain" a certain age, inures to all children born before the first child attains that age, though after the testator's death, but not afterwards. *Hubbard v. Lloyd*, 55.
24. DIMINUTION OF TRUST FUND, SET APART FOR LEGATEE, FALLS UPON HER, and not upon the testator's estate, where a stated sum is bequeathed to be held in trust by the executors, the income, without diminution of the principal, to be paid to the legatee quarterly until her decease, the whole fund then to be the property of her children, where the sum specified is set apart by the executors and invested in good faith. *Id.*
25. BEQUEST MADE BY TESTATOR bequeathing all his personal estate equally to his wife and three children to be held equally so long as his wife should continue his widow, but in the event of her marrying, her interest should go to the children, is not a bequest in restraint of marriage, but is strictly a limitation of the estate of the wife. *Pringle v. Dunkley and Wife*, 110.
26. DEVISEE OF ONE TRACT OF LAND ELECTING TO TAKE, by paramount title, another tract devised to another devisee, holds the legal title to the first tract, but is bound in equity as a trustee to compensate the disappointed devisee. *Lewis v. Lewis*, 443.
27. DEVISEE ELECTING BY PARAMOUNT TITLE ESTATE WORTH MORE than the one devised to him forfeits the devised estate, which may be recovered by the disappointed devisee in ejectment; although in a case purely for compensation, towards which, and not towards forfeiture, as a general principle in such cases, the weight of authority decisively inclines, the remedy would be by sequestration. *Id.*
28. GRANT OF REAL PROPERTY TO MARRIED WOMAN for life, and thereafter to the heirs of her body, and to them and their heirs and assigns forever, creates in her an estate-tail descendible to her eldest son. *Hileman v. Bouslaugh*, 474.
29. NO WORD OR PHRASE IN TESTAMENT CAN BE DIVERTED from its appropriate subject by extrinsic evidence showing that testator commonly, or on that particular occasion, used the disputed word in a sense peculiar to himself, or even in a popular sense, as distinguished from its strict and primary import. *Yundt's Appeal*, 496.
30. ESTATE DEVISED TO SON AND DAUGHTER IN COMMON, upon condition that should the daughter marry or die it should belong to the son in sev-

swalty: *Held*, that the condition was in restraint of marriage, and void. *Williams v. Cowden*, 143.

See DEEDS, 1; USES, 2.

WITNESSES.

1. JURAT OF DOCUMENT MUST SHOW that the oath was administered by the person subscribing the *jurat*. *Powers v. Shepard*, 168.
2. OBJECTION TO COMPETENCY OF WITNESS ON ACCOUNT OF INTEREST must be taken at the time of his testifying, if the fact of interest was known, or if, by evidence afterwards offered in the case, the interest of the witness should be apparent, the court should be asked to rule the evidence out; otherwise, the objection would not be available on appeal. *Inglebright v. Hammond*, 430.
3. IN COURT OF EQUITY, PARTY TO SUIT MAY BE COMPETENT WITNESS. *Glenn v. Wallace*, 657.
4. PLAINTIFF CANNOT EXAMINE CO-PLAINTIFF as a witness. *Id.*
5. DEFENDANT CANNOT EXAMINE PLAINTIFF AS WITNESS, but must file his bill of discovery. *Id.*
6. IF EXAMINATION OF PARTIES AS WITNESSES IS INTENDED, a statement in writing of the points upon which it is proposed to examine them should be submitted, that the court may perceive whether the witness is interested or not. *Id.*
7. MERCHANT PLAINTIFF PROVING ENTRIES MAY BE CROSS-EXAMINED as to the circumstances under which the entries were made. *Thomson v. Porter*, 653.
8. MERCHANT IS COMPETENT TO PROVE HIS OWN ENTRIES and the delivery of the goods. *Id.*
9. HUSBAND AND WIFE, THOUGH DIVORCED, CANNOT TESTIFY AGAINST EACH OTHER as to any matters occurring during the marriage. *Dickerman v. Graves*, 41.
10. DIVORCED WIFE IS COMPETENT WITNESS IN ACTION FOR CRIMINAL CONVERSATION, brought by her husband, to prove criminal intercourse with her during the marriage. *Id.*
11. IN ACTION OF TRESPASS AGAINST SHERIFF FOR SELLING ONE PERSON'S GOODS on an execution against another, the latter is a competent witness to prove that the goods belonged to the former. In such action, the sheriff may show, in mitigation of damages, that the goods were bought in for the owner at an undervalue; for the measure of damages in such a case is the amount that it cost the plaintiff to redeem, with interest thereon. *Forsyth v. Palmer*, 519.
12. WITNESS CANNOT BE IMPEACHED BY STATEMENT WHICH HE MADE before a magistrate on a previous occasion, when a hearing of *habeas corpus*, involving the same matter, took place, unless such statement was read to the witness and signed by him. *Nelms v. State*, 94.
13. TESTIMONY OF WITNESSES WHO SWEAR POSITIVELY, AND ARE OTHERWISE UNIMPEACHED, should not be discredited merely because they are related to the party in whose behalf they testify, although this is a circumstance to be weighed in a doubtful case. *In re Gangwere's Estate*, 554.
14. INQUIRIES INTO CHARACTER OF WITNESS FOR PURPOSE OF DISCREDITING HIM may extend to his general moral character. *State v. Shields*, 147.

15. **INQUIRIES INTO CHARACTER OF WITNESS FOR CHASTITY** are permissible for the purpose of discrediting her. *Id.*
16. **IMPRACHING WITNESS BY PROOF OF CONTRADICTORY STATEMENTS** can only be done by first calling witness's attention to the alleged conversations, and asking him if he had held the particular conversation, stating the time, place, and person involved in the supposed contradiction. *Moore v. Bettie*, 771.
- See **ASSIGNMENT OF CONTRACTS**, 2; **CRIMINAL LAW**, 4-7; **EVIDENCE**, 15, 16; **JURY AND JURORS**, 7; **NEGOTIABLE INSTRUMENTS**, 6; **PUBLIC LANDS**, 2; **WILLS**, 1, 5.

WORDS AND PHRASES.

- See **BAKES AND BANKING**, 2; **CONSTITUTIONAL LAW**, 2; **CRIMINAL LAW**, 12; **EVIDENCE**, 21; **WILLS**, 18, 22.

WRIT OF ERROR.

- See **PLEADING AND PRACTICE**, 14, 15, 17.
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